No. 99-859-CFX Title: Central Green Co., Petitioner
v.
United States

Docketed: November 19, 1999 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 19 1999	Petition for writ of certiorari filed. (Response due February 18, 2000)
	Dec 16 1999	Order extending time to file response to petition until January 19, 2000.
	Jan 14 2000	Order further extending time to file response to petition until February 18, 2000.
	Feb 15 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Feb 18 2000	Brief of respondent United States in opposition filed.
	Feb 29 2000	Reply brief of petitioner Central Green Co. filed.
	Mar 1 2000	DISTRIBUTED for Conference of March 17, 2000
	Mar 10 2000	Supplemental brief of respondent filed.
	Mar 10 2000	LODGING consisting of ten copies of lower court material submitted by the Solicitor General and distributed.
	Mar 10 2000	Supplemental brief of petitioner filed.
	Mar 13 2000	LODGING consisting of fifteen copies of lower cout material submitted by counsel for petitioner and distributed.
	Mar 20 2000	Petition GRANTED. SET FOR ARGUMENT October 30, 2000. **********
	Apr 10 2000	Blanket consent from counsel for the petitioner to the filing of amicus briefs in support of either party.
	Apr 18 2000	Order extending time to file petitioner's brief on the merits to and including June 5, 2000.
	Jun 2 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Jun 5 2000	Joint appendix filed.
	Jun 5 2000	Brief of petitioner Central Green Co. filed.
	Jun 27 2000	Order extending time to file respondent's brief on the merits to and including August 7, 2000.
	Aug 7 2000	Brief of respondent United States filed.
	Aug 7 2000	LODGING consisting of twenty copies of the contract between the United States and Madera Irrigation District and 20 looseleaf bound copies of the Friant Flood Report, Dept. of the Army, rev. August 1980, submitted by the Solicitor General.
	Aug 22 2000	Application (00A164) to extend the time to file a reply brief from September 7, 2000 to September 25, 2000, submitted to Justice O'Connor.
	Aug 23 2000	Application (00A164) denied by Justice O'Connor.
	Sep 5 2000	Record filed.
	Sep 6 2000	Record filed.
	Sep 6 2000	Reply brief of petitioner Central Green Co. filed.
	Sep 22 2000	CIRCULATED.
	Oct 10 2000	LODGING consisting of twenty-five sets of three maps in booklet format submitted by the Solicitor General and distributed.

No. 99-859-CFX

Entry	Date	Proceedings and Orders
	Oct 30 2000	ARGUED.

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No. 99-___

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 19, 1999

51pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the Madera Irrigation District was a party to the proceedings below.

Petitioner Central Green Company is a limited partnership with no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Central Green Company respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The lower courts held that Respondent United States is immune from this suit pursuant to the Flood Control Act of 1928, 33 U.S.C. 702c. The district court's opinion dismissing the complaint as to Respondent is reprinted in the appendix ("App.") at 10a-20a. The court of appeals' opinion (per Trott, J., joined by Hug, C.J., and Fletcher, J.) affirming is reported at 177 F.3d 834 and reprinted in the appendix at 1a-9a. The court of appeals' order denying rehearing and rehearing en banc is reprinted in the appendix at 21a.

JURISDICTION

Because the court of appeals entered its order denying rehearing and rehearing en banc no more than ninety days ago on September 7, 1999, this Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The immunity provision of the Flood Control Act of 1928, 33 U.S.C. 702c, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT OF THE CASE

This Petition presents the question whether the Flood Control Act of 1928 ("the Act") immunizes the United States from liability for damage caused by waters that were not carried in a federal flood control project to control floods. Petitioner's farm was damaged by *irrigation* waters carried in an *irrigation* canal. This case, accordingly, has nothing at all to

do with floods or flood waters for purposes of the Act. The panel below nonetheless reluctantly held that, under settled Ninth Circuit precedent, Respondent is immune from liability because the canal is nominally part of a massive federal public works project that has, as one of many authorized purposes, "flood control."

The panel took pains to emphasize that Respondent would *not* have been entitled to immunity in several other circuits, to express serious doubts about whether its decision was correct under this Court's precedents, and to invite this Court to grant certiorari to review its decision. App. 5a, 7a, 9a. Numerous other decisions of the courts of appeals have acknowledged that the circuits' conflicting tests for finding immunity are outcome determinative. *See infra* at 13-17. In an opinion respecting the denial of certiorari in a related case in 1992, Justice Stevens similarly drew attention to the "recurring conflict among the courts of appeals" on this issue, which has "assumed greater and greater importance," and urged Congress to resolve it. *Hiersche* v. *United States*, 503 U.S. 923, 923. But in the seven years since *Hiersche* it has become plain that only this Court can resolve the conflict: Congress has not amended the statute to resolve the substantial uncertainty over the scope of the government's immunity and still shows absolutely no interest in doing so; nor has Respondent, which is the only entity in a position to prod Congress into action, apparently urged any clarification to the statute.

The scope of the Act's immunity provision is, moreover, of overriding national importance because, as Respondent has urged to this Court, federal "flood control projects" are embodied in "a vast public works program" that include more than nine thousand different facilities and at which "[d]amage to both persons and property is unavoidable." Pet. for Cert., No. 85-434, *United States* v. *James* 20, *cert. granted*, 474 U.S. 978 (1985). Certiorari accordingly should be granted.

1. Petitioner Central Green Company owns and operates a pistachio farm ("the Farm") on approximately one thousand

acres of land in California's San Joaquin Valley ("the Valley"). This suit arises because the Madera Canal ("the Canal"), which conveys irrigation water through the Valley and runs through the Farm, leaks. Among other things, the leaking water creates an extremely shallow water table, which has irreparably damaged Petitioner's pistachio orchard and has increased Petitioner's farming and harvesting costs.

Petitioner accordingly sought compensation for this damage from Respondent United States, which owns the Canal and which designed and built the Canal, as well as from the Madera Irrigation District ("the District"), which is obligated by contract to operate and to maintain the Canal. Petitioner first requested compensation directly from Respondent and the District. When those requests were denied, Petitioner timely filed this suit against Respondent and the District for damages and for an order directing the defendants to repair the Canal.

Respondent United States moved for judgment on the pleadings on the ground that the immunity provision of the Flood Control Act of 1928, 33 U.S.C. 702c, deprived the district court of subject matter jurisdiction. The Act, which authorized the construction of a flood control system in the Mississippi Valley in response to the great flood of 1927, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

Respondent's assertion that the Act applies in this case is extraordinary because the *only* possible link between the damage to Petitioner's Farm and "flood waters" is that the Canal is part of the "Friant Division" of a massive public works project known as the Central Valley Project ("the CVP"), which has as one of its many different purposes "flood control." Respondent does not contend that the Canal itself has even the slightest thing to do with flood control because the Canal conveys *irrigation* water for the aptly named Madera *Irrigation* District. *Accord* App. 9a (court of appeals'

decision; "The canal is not a flood control project and serves no flood control purpose."); Resp. C.A. Br. 5 ("the Madera Canal * * * was used for irrigation").

Petitioner accordingly argued in the district court that Respondent was not entitled to immunity under this Court's decision in *United States* v. *James*, which held that the Act confers immunity only when two conditions are met:

> The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to [i] all waters contained in or carried through a federal flood control project [ii] *for purposes of or related to flood control*, as well as waters that such projects cannot control.

478 U.S. 597, 605 (1986) (emphasis added). Petitioner assumes for present purposes that (although it is a real stretch), the waters leaking from the Canal conceivably can be said to be "contained in or carried through a flood control project * * * [or] waters that such projects cannot control": the Canal is part of the Friant Division (abeit a part that has nothing to do with flood control), which in turn is one component of the CVP, which in turn has among its several purposes flood control. But there is no apparent basis for even asserting – and Respondent pointedly has never contended otherwise – that the waters met *James*' second prong: that they were carried in the Canal "for purposes of or related to flood control," *id.* The waters, which were in the Canal for purposes of *irrigation*, thus were "related to" flood control only in the sense that – because the Canal is part of the Friant Division, which is part of the CVP, which has as one of its purposes flood control – *all* waters *anywhere* in the entire CVP are "related to" flood control even when they are used exclusively for irrigation, or "to protect, restore, and enhance fish, wildlife, and associated habitats," or for "water conservation," or for "municipal and industrial power," all of which – like "flood control" – are among the CVP's expressly authorized purposes.

Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992). That relationship is not only implausibly attenuated, but it is also plainly insufficient under *James*, which requires both (i) that the waters were "contained in or carried through a federal flood control project" (here, the CVP) *and also* (ii) that they were so carried "for purposes of or related to flood control." The government accordingly is entitled to immunity in this case only if the second prong of the *James* test is ignored or, as the panel below later candidly acknowledged, "delete[d]," App. 7a.

Respondent nonetheless argued in the district court that, *James* notwithstanding, under "the Ninth Circuit's settled position," "section 702c protection [applies] when the would-be flood waters are 'carried thorough a federal flood control project' but are *not* necessarily carried for the specific 'purposes of * * * flood control.'" Court of Appeals Excerpts of Record ("C.A. Rec.") 71 (emphasis in original) (quoting *United States* v. *James*, *supra*, 478 U.S. at 605). In particular, Respondent maintained that the Ninth Circuit consistently holds the United States immune on similar facts notwithstanding that "'[i]n some Circuits the Government's flood-control immunity would *not* constitute a defense in the case of injuries resulting from Government conduct that was unrelated to any flood control purpose.'" *Id.* at 69 (quoting *Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (opinion of Stevens, J., respecting the denial of certiorari)) (emphasis added).[1]

Specifically, in *McCarthy* v. *United States*, 850 F.2d 558 (1988), *cert. denied*, 489 U.S. 1052 (1989), the Ninth Circuit held that the Act confers immunity so long as the plaintiff's

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[1] As Petitioner explains *infra* at 12, Respondent's support for the Ninth Circuit's standard cannot be reconciled with its repeated acknowledgment to *this Court* that immunity is available under *James* only for waters carried "for purposes of or related to flood control."

damages are not "wholly unrelated" to a flood control project. In *Washington* v. *East Columbia Basin Irrigation District*, 105 F.3d 517, *cert. denied*, 552 U.S. 948 (1997), and *Morici Corp.* v. *United States*, 681 F.2d 645 (1982), the Ninth Circuit found that the Act confers immunity even with respect to waters carried in a clearly separate facility – such as an irrigation canal – that serves no flood control function whatsoever, so long as that facility is included in a public works project – such as the CVP – that has as one of its many authorized purposes "flood control." Thus, according to Respondent's motion to the district court, "Under the well-settled Ninth Circuit rule of *McCarthy*, *Morici*, and *East Columbia*, the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley project is dispositive." C.A. Rec. at 146. After emphasizing that the Ninth Circuit had adopted a "but for" test of causality, the government concluded, in language that illustrates perfectly that its theory of immunity is grossly attenuated:

> Because [i] the Madera Canal is *part* of the Central Valley Project, because [ii] the Central Valley project has flood control as *one* of its purposes, and because [iii] plaintiff's damage from seepage of project waters from the Madera Canal was not "*wholly unrelated*" to the use of the Madera Canal, this Court should grant judgment on the pleadings dismissing plaintiff's tort claims for lack of subject matter jurisdiction.

Id. at 149-50 (emphasis added).

Describing the Ninth Circuit precedent cited by Respondent as "very clear," the district court agreed and dismissed the case as to the United States. App. 20a. The court accordingly entered a final judgment as to Respondent, *see* Fed. R. Civ. P. 54(b), and stayed the remainder of the case pending Petitioner's appeal.[2]

2. On Petitioner's timely appeal, Respondent asserted once again that settled Ninth Circuit precedent compelled holding the United States immune from this suit, notwithstanding that the waters which damaged Petitioner were not carried in the Canal "for purposes of or related to flood control" under *James*:

> The damage sustained by Central Green resulting from a water leak from the Madera Canal that was used *for irrigation* is well within this circuit's test for applicability of the flood control immunity created by 33 U.S.C. § 702c. The United States is entitled to immunity if the damage is "not wholly unrelated" to a federal flood control project. *Washington* [v. *East Columbia Basin Irrig. Dist.*, *supra*,] 105 F.3d at 518. In other words, if the damage is related *in any manner* to a project that has flood control as *one* of its purposes, then § 702c immunity attaches. That Madera Canal is part of the Central Valley Project, a multi-purpose project that involves flood control, settles the issue.

Resp. C.A. Br. 5 (emphasis added).

The panel reluctantly agreed that it was bound by Ninth Circuit precedent to affirm the district court's dismissal, but took extraordinary pains to express substantial doubts about the result, to acknowledge the contrary view of other circuits, and to invite this Court to grant certiorari in this case to address the question presented. The panel began by noting that

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[2] Because the Ninth Circuit affirmed the dismissal as to Respondent, this Petition is not premature as interlocutory. *E.g.*, *Geissal* v. *Moore Med. Corp.*, 524 U.S. 74 (1998); *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *Renne* v. *Geary*, 501 U.S. 312 (1991).

> [t]he circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach. Although we have held that immunity protects the government as long as the damage is not wholly unrelated to a project with flood control as one of its purposes, other circuits have found that standard to be too broad and require a more substantial nexus between flood control activities and the damage incurred.

App. 4a. In particular, although some courts agree with the Ninth Circuit's reading of the Act, the panel explained that others read *James* to endorse the "two-part test" discussed *supra* and accordingly to preclude a finding of immunity on these facts. For example:

> The Fourth Circuit looks at the purpose for which the water was being held and ultimately released to determine whether immunity attaches. The Seventh Circuit refuses to grant § 702c immunity unless flood-control activities increased the likelihood of the plaintiff's injuries. The Tenth Circuit has adopted the two part test that requires the existence of a nexus between flood control activity and the plaintiff's injury.

Id. 5a (citing *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995); *Bailey* v. *United States*, 35 F.3d 1118 (7th Cir. 1994); *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978)). Accordingly, the panel below recognized that "had this case been instituted in the Fourth, Seventh or Tenth Circuit[s] the government would probably *not* enjoy flood control immunity." App. 9a (emphasis added).[3]

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[3] As is described fully *infra* at 18-23, Petitioner also would prevail in the Sixth and Eighth Circuits, and likely would prevail in the Fifth Circuit.

Turning to the merits of the dispute, the panel looked to this Court's decision in *James* and expressed serious doubts about the Ninth Circuit's position:

> After reviewing the *James* decision, we are not certain that § 702c should be construed as broadly as our prior decisions. The plain language of the definition of "flood waters" in *James* requires that the water be held in a federal flood control project "for purposes of or related to flood control." 478 U.S. at 605. Our decisions have focused on the "related to" language in the *James* definition and conferred very broad immunity. However, as explained above, the *Morici*, *McCarthy*, and *East Columbia Basin* cases seem to *delete the second requirement* in *James* and grant immunity if the water was contained in a federal flood control project.

App. 7a (emphasis added). The court furthermore recognized that its failure to follow the approach of other circuits has "harsh result[s]":

> The "not wholly unrelated" test applied by this and other circuits reads broadly an already broadly-written grant of immunity. There does not appear to be *any set of facts* where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project. Indeed counsel for the government admitted at oral argument that she could not think of *any situation* where § 702c would not confer immunity.

Id. 8a-9a (emphasis added).

Because its decision conflicted with this Court's holding in *James* that the Act confers immunity only with respect to waters carried "for purposes of or related to flood control," as well as with decisions of several other circuits, the panel below concluded by issuing an extraordinary invitation to this Court to grant certiorari to resolve the question presented:

> In denying certiorari to a case that could have resolved the conflict in circuit opinions on this issue, Justice Stevens suggested that this split in the circuits could be "resolved more effectively by Congress." *Hiersche* v. *United States*, 503 U.S. 923, 925 (1992). While agreeing with Justice Stevens, we believe this case might be an appropriate subject for Supreme Court review.

App. 9a.[4]

3. This Petition followed.

REASONS FOR GRANTING THE WRIT

As the panel below acknowledged, the decision below conflicts not only with this Court's holding in *United States* v. *James*, *supra*, that the Flood Control Act of 1928 grants immunity only for waters carried in a flood control project "for purposes of or related to flood control," 478 U.S. at 605, but also with decisions of other circuits that have been faithful to *James* and that would reject Respondent's claim of immunity in this case. The scope of Respondent's liability is, moreover, of overriding national importance in light of the many thousands of federal flood control projects around the country at which, as Respondent advised this Court in *James*, "[d]amage to both persons and property is unavoidable." Pet. for Cert., No. 85-434, *United States* v. *James*, *supra*, at 20. There is no reason to believe that Congress will address the substantial confusion surrounding the government's immunity. Certiorari accordingly should be granted.

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[4] Petitioner's complaint specified that the leaking water had caused "subsurface flooding" on the Farm. But, as Respondent has expressly acknowledged and the lower courts concluded, the government is not entitled to immunity unless the requirements of *United States* v. *James*, *supra*, are satisfied as well. Pet. App. 3a, 11a-12a, C.A. Rec. 68 & n.1.

I. The Decision Below Conflicts With *United States* v. *James*.

In *United States* v. *James*, this Court held that the Flood Control Act confers immunity for damage caused by the operation of "federal flood control facilities *to prevent flooding*." 478 U.S. at 605 n.7 (emphasis added). The case arose from two accidents in which the government negligently failed to provide sufficient warning before releasing water to reduce flood control reservoirs from flood stage, causing recreational boaters to be swept away to their deaths. Relying on the plain text of the statute – which applies to "any damage from or by floods or flood waters at any place," 33 U.S.C. 702c – this Court rejected the assertion that the Act does not apply to "the negligent or wrongful acts of government employees." *Id.* at 603 (citation and quotation marks omitted).

The decision below conflicts with *James*, which distinguished carefully among the Act's terms. Regarding the Act's references to "liability of *any* kind," "*any* damage," and "*any* place," the Court described the statute as "sweeping," such that it is "difficult to imagine broader language." 478 U.S. at 604 (emphases in *James*). But regarding the Act's separate reference to "floods or flood waters" – on which the instant case turns – *James* explained that the government's immunity is limited:

> The Act concerns flood control projects designed to control floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters [i] contained in or carried through a federal flood control project [ii] *for purposes of or related to flood control*, as well as to waters that such projects cannot control.

478 U.S. at 605 (emphasis added). This Court emphasized the second of these requirements in an accompanying footnote, which took pains to explain that "the District Court in each case found that the waters were being released from fed-

eral flood control facilities *to prevent flooding*." *Id.* at 605 n.7 (emphasis added). The Court made the same point when it rejected the plaintiffs' claim that "their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control" on the ground that "the release of the waters * * * was *clearly related to flood control*." *Id.* at 609-10 (emphasis added).[5]

In this case, both the Ninth Circuit and Respondent acknowledged that the Canal's only function is to carry *irrigation* water; it has nothing to do with flood waters. *See supra* at 4a-5a. There is, accordingly, no reasonable basis for asserting that the waters were carried "for purposes of or related to flood control" as *James* requires. Instead, as the panel below recognized, Respondent was awarded immunity in this case only because settled Ninth Circuit precedent has "delete[d]" *James*' second requirement. App. 7a. Respondent's support for the Ninth Circuit's view of *James* is surprising because Respondent repeatedly has acknowledged to *this Court* that the two-prong test represents *James*' holding and accordingly is binding precedent. Br. of Resp. in Opp., No. 91-774, *Hiersche* v. *United States* 5; Br. of Resp. in Opp., No. 89-829, *Dewitt Bank & Trust Co.* v. *United States* 4; Br. of Resp. in Opp., No. 88-919, *McCarthy* v. *United States* 4.[6]

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[5] Nor does the Act's legislative history suggest a broader application of Respondent's immunity. As *James* explains, the legislative history, although "broad and emphatic," 478 U.S. at 608, only "reinforces the plain language of the immunity provision," which as noted extends only to waters carried "for purposes of or related to flood control," *id.* at 605-06. There is no indication in the legislative history that Congress conceived that the Act's immunity provision would extend to irrigation waters in an irrigation canal. To the contrary, as *James* explains, it was "the intention of Congress to protect the Federal Government from any damages liability that might arise *out of flood control*." *Id.* at 612 (emphasis added).

[6] *James* itself rejected Respondent's effort to expand its immunity further. The government had argued in its brief in *James* that "[s]ince Congress was legislating with respect to flood control projects designed to carry flood waters, the conclusion is inescapable that the statute refers to all waters contained in or carried through such structures as well as waters the structures could not retain." Br. for United States, No. 85-434, *United States* v. *James* 17. This Court adopted that statement from the government's brief almost verbatim, except that it added the critical caveat that the Act applies only to waters carried "for purposes of or related to flood control." 478 U.S. at 605.

II. The Decision Below Conflicts With Rulings Of Several Other Circuits.

1. a. The panel in this case recognized that "[t]he circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach" and that Respondent would not be accorded immunity in several other circuits. App. 4a. But, purporting to find order in this chaos, Respondent recently has taken the contrary view that "the courts of appeals are not truly divided on this issue." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States* 6. Specifically, Respondent distinguishes between two classes of cases:

> In a number of cases involving [i] injuries with a *nexus to flood control projects*, courts of appeals have held that the government is immune from suit. In other cases, involving [ii] activities *unrelated to the projects' flood control functions*, or waters found not to be "flood waters" within the meaning of Section 702c, courts of appeals have rejected the United States' immunity defense.

Id. at 7-8 (footnotes omitted) (emphasis added).

Respondent's categorization of the circuits' decisions is illusory because it confuses (i) whether the plaintiff was injured at a flood control *project* with (ii) whether the *conduct* that caused the injury was related to flood control *activities*. In a sense, this is the difference between a noun (the flood

control project) and a verb (the flood control activities). For example, both conditions were satisfied in *James*, in which the plaintiffs' injuries (i) arose on flood control projects (the lakes) and also (ii) were caused by governmental conduct related to flood control activities (releasing water to reduce the lakes from flood stage). The present conflict in the circuits, by contrast, arises from cases in which the latter condition is not satisfied, *i.e.*, in which the government claims immunity for actions unrelated to its flood control activities. To put this in the terms of Respondent's erroneous attempt to make the circuits' conflicting decisions consistent, in many cases in which the plaintiff's claim arises at "federal flood control *projects*" (such as a flood control dam or lake), the plaintiff's claim nonetheless rests on the government's "activities unrelated to the projects' flood control *functions*" (such as irrigation).

This case is the perfect example. Because the waters leaking from the Canal are related to a "flood control project" in the sense that one of the purposes of the CVP is flood control, Respondent cites the Ninth Circuit's decision in this case as granting immunity based on a "nexus" to "a flood control project." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 7 n.3. But Petitioner's allegations plainly arise from the government's "activities unrelated to the [CVP's] flood control *functions*," because the purpose of the Canal is to carry *irrigation* water. Thus, under Respondent's formulation, the government should *not* be immune in this case. In particular, there is no basis to distinguish this case from decisions of several other circuits that, as Respondent acknowledges, reject the government's assertion of immunity for conduct that occurred at a flood control facility but was unrelated to flood control efforts. *Id.* at 8 & n.4; *see also infra* at 18-23 (discussing conflict between Ninth Circuit's decision in this case and *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity when government employee was driving boat on flood control lake), *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity when

flood control dam was opened to generate electricity), *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity when flood control lake was used for recreational purposes), and *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978) (no immunity when flood control dam was opened for any purpose other than flood control)).

b. Respondent also invokes the Sixth Circuit's statement in *Cantrell* v. *United States* that "the differences between the circuits have more to do with the facts of the particular cases * * * than with a dispute about the meaning of § 702c," such that the court could find "no case whose facts and ultimate holding may not be reconciled with our method." Br. of Resp. In Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 6-7 (quoting 89 F.3d 268, 272-73 (1996)). The Sixth Circuit's "method" is to focus on the alleged wrongful conduct and to deny the government immunity if "the plaintiff can recover without holding the government liable for a privileged activity – i.e., an activity (or a physical phenomenon caused by an activity) somehow necessary in the government's battle to control floods." 89 F.3d at 274.

Respondent's reliance on *Cantrell* is, to say the least, surprising. The Sixth Circuit's attempt to rationalize the circuits' various decisions based on whether the government's tortious conduct was part of its flood control activities, 89 F.3d at 272-73, *conflicts* with Respondent's own categorization of the courts of appeals' decisions. Thus, in opposing certiorari from a Ninth Circuit decision that expressly *refused* to follow *Cantrell*, Respondent proposed the *identical* categorization as in its recent brief in the *Paulk* case, *see supra*, but frankly acknowledged that "the Sixth Circuit has *departed* from [the] fact-specific inquiry into the causal connection between the particular injury involved and federal flood control activities [used by other circuits], requiring instead a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c." Br. of Resp. in Opp., No. 97-1039, *Merritt* v. *United States* 6 n.2, 8

(emphasis added) (citing *Cantrell* v. *United States*, *supra*); Pet. for Cert., No. 97-1039, *Merrit* v. *United States*, App. (Ninth Circuit's ruling; "Finally, we decline plaintiffs' invitation to adopt the analysis of *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996). * * * We cannot adopt a new standard, however, when our own precedent on this issue is so clear. Even the court in *Cantrell* acknowledged that its analysis *departed from our precedent*." (emphasis added)); *see also Cantrell* v. *United States*, 89 F.3d at 273-74 (acknowledging that Sixth Circuit "analyze[s] the problem before us in a different manner than other appellate courts have in the past"); Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 9-10 n.4 (acknowledging that *Cantrell* departed from Ninth Circuit's standard).

In addition, *Cantrell*'s attempt to rationalize the circuits' various tests expressly *excluded* the Ninth Circuit's standard, which the Sixth Circuit explained would reach a contrary result and which "makes little sense in light of the text and purposes of the Act." 89 F.3d at 271; *see also id.* ("If faced with our case, the Ninth Circuit probably would note that Fishtrap Lake is used for flood control and *affirm the dismissal without further inquiry*." (emphasis added)). The most that the Sixth Circuit could say was that, as of that date, "[t]he circuit courts with the toughest-sounding tests, like the Ninth Circuit, report no cases where the plaintiff's theory of liability did not involve a challenge to the government's flood control activities or the government's decisions about how to maintain flood control waters." *Id.* at 272. But that is no longer true because, as the Sixth Circuit anticipated, the Ninth Circuit has subsequently extended the government's immunity to cases in which the plaintiff's claim arose from irrigation waters unrelated to the government's flood control efforts, including in this case. *See also Washington* v. *East Columbia Irrig. Dist.*, *supra*, 105 F.3d 517. As is discussed *infra* at 18-19, the Ninth Circuit's decision in this case therefore conflicts directly with the Sixth Circuit's decision in *Cantrell*, under which Respondent would be denied immunity.

Other courts, and indeed a Justice of this Court, accordingly have been correct in their repeated recognition that the conflict in the circuits over the scope of Respondent's immunity under the Flood Control Act is both substantial and outcome determinative. Thus, Justice Stevens recognized seven years ago that the government's assertion that it was immune under the Act for "conduct that was unrelated to any flood control purpose" had given rise to "a recurring conflict among the courts of appeals." *Hiersche* v. *United States*, *supra*, 503 U.S. at 923; *see also Zavadil* v. *United States*, 498 U.S. 1108 (1991) (noting that White, J., would grant certiorari). In fact, Respondent in its brief below *agreed* with Justice Stevens' assessment. *See supra* at 5.

Similarly, the Seventh Circuit has recognized that the circuits regularly reach "inconsistent results" in "cases inquiring whether the source of harm had some nexus to flood control," such that "it is not even settled with what there must be a flood control nexus–the project, the risk that led to the particular accident, or the plaintiff's injury." *Bailey* v. *United States*, 35 F.3d 1118, 1120-21 (1994) (collecting cases). And, as the Ninth Circuit explained in an earlier decision, this Court's "failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases." *Washington* v. *East Columbia Basin Irrig. Dist.*, *supra*, 105 F.3d at 519 n.3; *see also Boudreau* v. *United States*, 53 F.3d 81, 83 (5th Cir. 1995) ("[T]here is disagreement among the circuits on the application of § 702c." (collecting cases)), *cert. denied*, 516 U.S. 1071 (1996); *Dawson* v. *United States*, 894 F.2d 70, 73 (3d Cir. 1990) ("The courts of appeals which have considered section 702c immunity post-*James* have not interpreted the 'wholly unrelated' standard uniformly." (collecting cases)); *cf. Fisher* v. *United States*, 31 F.3d 683, 685 (8th Cir. 1994) (Gibson, J., dissenting) ("In recent years several decisions of other circuits have called into question the broad scope of this statute.").

2. The panel below specifically was correct to conclude that Respondent would not be entitled to immunity in several other circuits. App. 9a. In particular, Respondent's assertion of immunity clearly would be rejected by the Fourth, Sixth, Eighth, and Tenth Circuits, and likely would be rejected in the Fifth and Seventh Circuits as well.

a. In *Cantrell* v. *United States*, *supra*, the plaintiff, who was injured when an Army Corps of Engineers boat crashed on a federal flood control lake, sued the United States for negligence in operating the boat. The Sixth Circuit held that "the Flood Control Act does not protect the government from a claim of negligence, even one arising from an accident on a lake used as a flood control reservoir, unless an act constituting part or all of the alleged breach of the duty of care was *an act undertaken to control flooding*." 89 F.3d at 269 (emphasis added). Put another way, the inquiry "is whether the plaintiff can recover without holding the government liable for a privileged activity – *i.e.*, an activity (or a physical phenomenon caused by an activity) somehow necessary in the government's battle to control floods." *Id.* at 274. Under that standard, the Act did not apply:

> Cantrell is clearly not challenging flood control decisions, as his counsel repeatedly stressed at oral argument. He has only one theory of liability: the pilot's negligence. Since the pilot's negligence was not part of government activity to control floods or flood waters, the immunity clause of the Flood Control Act is irrelevant to Cantrell's claim.

Id. at 273.

Under Sixth Circuit precedent, Respondent is not entitled to immunity in this case. Because Petitioner's theory of liability relates to irrigation water leaking from an irrigation canal, the allegations against Respondent have nothing at all to do with flood control or "the government's battle to control floods." As noted above, the Sixth Circuit specifically recog-

nized that the Ninth Circuit and it would reach conflicting results:

> [In the Ninth Circuit], [i]f the accident had anything to do with a flood control lake, or the management of a flood control lake, then the plaintiffs cannot sue. If faced with our case, the Ninth Circuit probably would note that [the lake] is used for flood control and affirm the dismissal without further inquiry.

89 F.3d at 271. Applying its decision in *Cantrell*, the Sixth Circuit would not find immunity in this case because "there [is] no meaningful causal nexus between the [leaking canal] and flood control activity even if the [canal] was 'related' to a flood control project, and even if the construction of the [project] was a 'but for' cause of the injury." *Id.*

b. In *Henderson* v. *United States*, 965 F.2d 1488, 1490 (8th Cir. 1992), the plaintiff's husband was killed when the government released water from a flood control dam "to generate hydroelectric power." Applying settled circuit precedent, the Eighth Circuit held that "section 702(c) immunity applies if 'governmental control of flood waters was a substantial factor in causing [the plaintiff's] injuries.'" 965 F.2d at 1492 (citations omitted). Under this standard, the government was not entitled to immunity in *Henderson* "because the dam activity * * * was related to generating electricity and not to flood control." 965 F.2d at 1492. Under the Eighth Circuit's standard, Respondent is not entitled to immunity in this case because, just as the waters in *Henderson* were used for "generating electricity" and not for "control of flood waters," the waters that damaged Petitioner's Farm were used to *irrigate*.

c. In *Boyd* v. *United States*, 881 F.2d 895, 899 (10th Cir. 1989), the plaintiff's husband was killed while snorkeling in a lake "created by the [Corps of Engineers] for flood control purposes" when he was struck by a boat. Expressly rejecting the two Ninth Circuit precedents on which Respondent prin-

cipally relied below, the Tenth Circuit held that immunity is available only for waters "being actively being used for flood control purposes." 881 F.2d at 900 (refusing to follow *McCarthy* v. *United States*, *supra*, 850 F.2d 558, and *Morici Corp.* v. *United States*, *supra*, 681 F.2d 645). The court explained that "Congress' concern was to shield the government from liability associated with *flood control operations*." *Id.* (emphasis added). The Ninth Circuit's contrary view, by contrast, confers immunity in circumstances "too attenuated to warrant the invocation of § 702c." *Id.*; *see also Holt* v. *United States*, 46 F.3d 1000, 1004 n.2 (10th Cir. 1995) (adhering to *Boyd* notwithstanding that "[o]ther circuits have rejected *Boyd*'s disapproval of the wholly unrelated standard and its determination that governmental operation of a dam as a recreational facility does not provide sovereign immunity"). In subsequent rulings, the Tenth Circuit has explained that *Boyd* adopts a two-part test:

> [A] court must examine whether (1) there is a "flood control project" that triggers the Act, and (2) a nexus exists between flood control activities and the injuries sustained. The inquiry under the nexus prong is primarily a factual one whereby a court must determine the nature of the activity creating the nexus with the injury.

Holt v. *United States*, *supra*, 46 F.3d at 1004 (quoting *Williams* v. *United States*, 957 F.2d 742, 743 (10th Cir. 1992); *Boyd* v. *United States*, *supra*, 881 F.2d at 900) (internal quotation marks omitted).

Under Tenth Circuit precedent, Respondent is not entitled to immunity in this case. In *Holt*, in which the government had an "underlying flood control purpose" in releasing water from a flood control dam, the Tenth Circuit found immunity. 46 F.3d at 1004. By contrast, in *Boyd*, the Tenth Circuit denied immunity because the flood control dam in question was used for recreational purposes. 881 F.2d at 900. Just as the waters in *Boyd* were used for recreation, the waters that

leaked onto Petitioner's Farm in this case had no "flood control purpose" but instead were used only for irrigation and accordingly do not bear the "nexus" to flood control required by the Tenth Circuit.

d. The Tenth Circuit's decision in *Boyd* parallels the approach of the Fourth Circuit in *Hayes* v. *United States*, 585 F.2d 701 (1978). In *Hayes*, the plaintiff sued the United States for damages caused by erosion that resulted from operation of a federal flood control dam. The court held that immunity under the Act does not extend to all activities related to a federal flood control facility but instead is "confined to damage from flooding which allegedly occurred *because of the government's antiflooding activity*." 585 F.2d at 702 (emphasis added); *see also id.* (immunity applies "if the release of the waters which allegedly damaged the farm was a consequence of the dam's operation *as a flood control project*" (emphasis added)); *Cox* v. *United States*, 827 F. Supp. 378, 380 (N.D. W.Va. 1992) (adhering to *Hayes*); C.A. Rec. 69 (Respondent's brief in district court; nothing Ninth Circuit's repeated rejection of *Hayes*). The Fourth Circuit accordingly remanded to allow the district court to determine "[i]f the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project," in which case "he would avoid the absolute bar of § 702c." *Id.* Under Fourth Circuit precedent, Respondent is not entitled to immunity in this case because the Canal was used only for purposes of irrigation, not flood control.

e. The fact that the Ninth Circuit in this case found Respondent immune for damage caused by an irrigation canal that has no flood control functions, while the above-cited cases denied immunity for injuries that arose at flood control facilities such as dams and lakes, substantially heightens the circuit conflict. *See Cantrell* v. *United States*, *supra*, 89 F.3d at 269 ("lake used as a flood control reservoir"); *Henderson* v. *United States*, *supra*, 965 F.2d at 1492 (dam "was created,

in part, for flood control purposes"); *Boyd* v. *United States*, *supra*, 881 F.2d at 899 (lake "was created by the [Corps of Engineers] for flood control purposes"); *Hayes* v. *United States*, *supra*, 585 F.2d at 701 (dam operated "as a flood control facility"). The damage in this case is far more attenuated from any activity related to flood control because it is not disputed that that the leaking irrigation canal "is not a flood control project and serves *no* flood control purpose." App. 9a (emphasis added). Put another way, because the Fourth, Sixth, Eighth, and Tenth Circuits would deny immunity even for damages arising from government irrigation activities *at a flood control lake*, *see supra*, they certainly would deny immunity when that damage occurs at an irrigation canal unconnected to flood control efforts.

f. Respondent also likely would not be accorded immunity in the Fifth or Seventh Circuits. Although the issue is not settled in the Seventh Circuit, that court has focused its inquiry on whether "flood control activities increase[d] the probability" of the plaintiff's injury. *Bailey* v. *United States*, *supra*, 35 F.3d at 1124 (remanding for determination by the district court). *Accord Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (Opinion of Stevens, J., respecting the denial of certiorari); App. 9a (court of appeals' opinion; concluding that Respondent likely would not be accorded immunity in Seventh Circuit). Under that standard, Respondent would not be entitled to immunity because only irrigation, not federal flood control efforts, damaged Petitioner.

The Fifth Circuit, in applying its "fact-specific" test, recently has denied immunity where the plaintiff, while standing on a beach fronting a flood control lake, was injured by a live electrical cable that was exposed by receding waters in the lake but was not itself "used in connection with flood control." *Kennedy* v. *Texas Utils.*, 179 F.3d 258, 260 (1999). Although *Kennedy* conceivably can be distinguished on the ground that the injury in that case was not caused by water, the court rested its holding on the fact that although the injury

occurred at a flood control facility, "[t]he electrical cable that injured Kennedy had no association with flood control, and the federal government's alleged malfeasance or nonfeasance bore no relation to flood control." 179 F.3d at 263. So, too, in this case, Plaintiff was damaged as a result of actions and a facility (the Canal) that have "no association with flood control." Accordingly, the Fifth Circuit likely would deny immunity in this case.

III. This Is A Recurring Question Of National Importance That Should Be Resolved By This Court.

There is no reason for this Court to delay resolving the circuit conflict over the proper scope of the government's immunity under the Flood Control Act. As Respondent urged this Court in *James*, the Act's immunity provision frequently is called into question because "[d]amage to both persons and property is unavoidable" at the more than nine thousand different flood control projects around the nation. Pet. for Cert., No. 85-434, *United States* v. *James*, supra, *at* 20. Justice Stevens therefore was surely correct when, noting that "the number and importance of federal flood-control projects has grown dramatically," he described the "recurring conflict among the courts of appeals" as "assum[ing] greater and greater importance." *Hiersche* v. *United States*, *supra*, 503 U.S. at 923.

Nor is there any reason to allow the question presented to percolate further, given that "[s]ince *James* many appellate courts have addressed the relationship between flood control activity and a plaintiff's injury that is necessary to allow the government to invoke the immunity provision of the Act," *Cantrell* v. *United States*, *supra*, 89 F.3d at 271, and the conflicting provisions have been thoroughly ventilated in the circuits as a result, *see supra* at 13-17. Certiorari is warranted in this case, in contrast with earlier petitions that called the scope of the Act into question, because the Ninth Circuit frankly has acknowledged that its decision conflicts with this

Court's decision in *James*, because an intractable circuit conflict now exists, and because this Petition presents an appropriate vehicle to resolve the conflict. *See supra* at 16 (describing development of conflict subsequent to Sixth Circuit's decision in *Cantrell* v. *United States*, 89 F.3d 268 (1996)); Pet. App. 7a (acknowledging that Ninth Circuit has "delete[d]" *James*' requirement that waters must be carried "for purposes of or related to flood control"). *Compare, e.g.*, Br. of Resp. in Opp., No. 97-1039, *Merritt* v. *United States* 9 (certiorari is inappropriate because "the record below * * * establishes a clear factual nexus between the injury in this case and federal flood control activities"); Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 10 (certiorari is inappropriate because "petitioner does not argue that this case would have been decided differently under any other circuit's approach").[7]

Certiorari furthermore is warranted because the scope of Respondent's immunity under the Act presents a straightforward question of statutory construction that falls squarely within this Court's role as the final arbiter of federal law. To the extent that there was some possibility that Congress might amend the Act to clarify its scope, *see Hiersche* v. *United States*, *supra*, 503 U.S. at 925 (opinion of Stevens, J., respecting the denial of certiorari), it is now plain that Congress is not going to intervene, and Respondent has never suggested

[7] In addition, in opposing certiorari from another Ninth Circuit decision, the government characterized the Petition as merely presenting the question "whether a multi-purpose project may be subdivided into different parts, some of which enjoy Section 702c immunity and some of which do not." Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 5. That is not true of the question presented by this Petition, which directly raises the nexus required under the Act between the government's flood control efforts and the damage incurred by the plaintiff.

otherwise. [8] The scope of the government's immunity under the Flood Control Act accordingly will remain the subject of substantial uncertainty until this Court rules on the question presented. Unless this circuit conflict is to be deemed "off limits" from this Court's jurisdiction for reasons that not only escape private litigants and the bar but also conflict with the guidance provided by S. Ct. R. 10, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition or a Writ of Certiorari should be granted.

Respectfully submitted,

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November 19, 1999

[8] Respondent has made the distinct argument that it would be inappropriate for this Court to overrule *United States* v. *James*, *supra*, because "any *change* to the immunity rule must come from Congress." Br. of Resp. in Opp., No. 99-390, *Paulk* v. *United States*, *supra*, at 6 (emphasis added). But in light of the many similar petitions for certiorari filed by the government in recent years, Respondent appropriately has not maintained that Congress is the institution best suited to resolve the current circuit split over the scope of the Act's immunity provision.

Central Green Company,
a California Limited Partnership,
Plaintiff-Appellant,
v.
United States of America;
Madera Irrigation District,
Defendants-Appellees.

No. 97-17321.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 6, 1998.

Decided May 20, 1999.

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

I. OVERVIEW

Central Green Company ("Central Green") appeals a district court decision dismissing its claims against the United States for lack of subject matter jurisdiction. Central Green sued the United States under the Federal Tort Claims Act for damage to its pistachio farm caused by subsurface and surface water flooding from the Madera Canal. The district court dismissed the action for lack of subject matter jurisdiction, finding that Central Green's claims were barred by 33 U.S.C. § 702c immunity for management of flood control waters. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II. BACKGROUND

Appellant Central Green owns one thousand acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the Madera Canal.

Central Green sued the United States and the Madera Irrigation District alleging that due to negligent planning, design, construction, or maintenance, the Madera Canal is leaking, causing surface and subsurface flooding of Central Green's property. Central Green also alleges that subsurface flooding created a shallow water table, resulting in irreparable harm to Central Green's pistachio orchard and increasing farming and harvesting costs.

Asserting § 702c immunity, the United States moved for judgment on the pleadings. The district court granted the United States's motion and dismissed Central Green's claims against the United States. The district court also stayed Central Green's claims against Madera Irrigation District pending resolution of this appeal.

III. STANDARD OF REVIEW

A district court's conclusion that it lacks subject matter jurisdiction is reviewed de novo. *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 916 (9th Cir. 1996).

IV. DISCUSSION

A. Immunity under § 702c of the Flood Control Act

Section 702c confers broad immunity for claims arising from the design, operation, or management of federally authorized flood control projects. Specifically, it provides that

"[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c (1994). In *United States v. James*, 478 U.S. 597 (1986), the Supreme Court, in interpreting § 702c, noted that "[i]t is difficult to imagine broader language." Indeed, the only limitation in the plain language of the statute is that the United States is only immune from damage caused by "floods or flood waters."

B."Flood Waters"

Central Green's sole argument on appeal is that the water that caused damage to its pistachio farm was not "flood water" because it was held for irrigation purposes rather than flood control. For support, Central Green relies on the Supreme Court's decision in *James*. In *James*, the plaintiffs were injured when they were swept through a dam as water was released to control flooding. *Id.* at 599. The Supreme Court held that § 702c protected the government from damages caused by failure to warn boaters of impending danger caused by releasing water through federal flood control projects. *Id.* at 604. The Supreme Court also addressed the issue of what constituted "flood waters" and held that

> [i]t is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

Id. at 605.

Relying on this definition, Central Green argues that the Supreme Court created a two-part test to determine when water is "flood water." Central Green's proposed two-part test would require that for water to be "flood water" it would have to (1) pass through a flood control project and (2) be for the purposes of or related to flood control. Ultimately, Central Green argues that because the water that damaged its crops

was held for irrigation and not flood control purposes, § 702c immunity should not apply.

Central Green's argument raises an apparent contradiction in the *James* decision. In the footnote to the definition of "flood waters," the Supreme Court favorably cited both *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982), and *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). *James*, 478 U.S. at 605 n. 7. Although both *Morici* and *Hayes* provide that there is no immunity for flooding caused by federal projects unrelated to flood control, *Morici*, 681 F.2d at 647, the two cases appear to be inconsistent. *Morici* applied the "not wholly unrelated" test and held that the purpose for which the project was being operated at the time of the flood damage was irrelevant to the issue of whether immunity applied. 681 F.2d at 648 ("Even if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not 'wholly unrelated' to a Congressionally authorized flood control project."). Conversely, *Hayes* held that whether immunity attached depended on the operation of the flood control project at the time of the injury. 585 F.2d at 702-3.

The apparent contradiction between these two cases and the resulting question about the definition of "flood waters" has been debated in the circuit courts. *See Boudreau v. United States*, 53 F.3d 81, 84-85 (5th Cir. 1995) (discussing the split in the circuits over the correct application of *James*); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990) (noting the disagreement between the circuits). The circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach. Although we have held that immunity protects the government as long as the damage is not wholly unrelated to a project with flood control as one of its purposes, other circuits have found that standard to be too broad and require a more substantial nexus between flood control activities and the damage incurred. Compare *Washington v. East Columbia Basin Irr.*

Dist., 105 F.3d 517, 519 (9th Cir.), *cert. denied*, 118 S. Ct. 364 (1997), *with Holt v. United States*, 46 F.3d 1000, 1004-05 (10th Cir. 1995), *and Boyd v. United States*, 881 F.2d 895, 899-900 (10th Cir. 1989).

Central Green's two-part test finds support in other circuits. The Fourth Circuit looks at the purpose for which the water was being held and ultimately released to determine whether immunity attaches. *Hayes*, 585 F.2d at 702-03 ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c."). The Seventh Circuit refuses to grant § 702c immunity unless flood-control activities increased the likelihood of the plaintiff's injuries. *Bailey v. United States*, 35 F.3d 1118, 1124 (7th Cir. 1994) (remanding for a hearing to determine whether injuries resulted from flood control activities); *Fryman v. United States*, 901 F.2d 79, 82 (7th Cir. 1990) (same). The Tenth Circuit has adopted the two part test that requires the existence of a nexus between flood control activity and the plaintiff's injury. *Holt*, 46 F.3d at 1004-05.

Despite support for the two-part test in other circuits, we have consistently focused on the "related to" language in the definition of "flood waters" and rejected Central Green's argument. *See East Columbia Basin*, 105 F.3d at 519-20; *McCarthy v. United States*, 850 F.2d 558, 562-63 (9th Cir. 1988); *Morici*, 681 F.2d at 648. We first announced the "not wholly unrelated" test in *Peterson v. United States*, 367 F.2d 271 (9th Cir. 1966). In *Peterson*, engineers at the Ladd Air Force base in Alaska dynamited ice and snow that was collecting and damming the flow of a river. *Id.* at 275. The explosion caused a large discharge of ice and water downstream, damaging Peterson's vessel. *Id.* We held that immunity did not protect the government's actions because "[t]he decision to dynamite the ice jam was wholly unrelated to any act of Congress authorizing expenditures of federal funds for

flood control, or any act undertaken pursuant to any such authorization." *Id.* We also distinguished dynamiting the ice jam from government programs aimed at preventing or minimizing damage caused by floods. *Id.* at 275-76.

Later in *Morici*, we again addressed the scope of § 702c. In *Morici*, the plaintiff argued that negligent operation of a dam and reservoir resulted in excessively high levels of water in the Sacramento River which caused water to seep out, damaging plaintiff's farm. 681 F.2d at 646. Morici did not argue that the water that damaged its crops was not flood water but argued instead that the negligent release of water from the dam was wholly unrelated to flood control activities. *Id.* at 647. We held that it was not the purpose of the specific release but rather the congressionally authorized purpose of the project which conferred immunity. *Id.* at 648. We also noted the impossibility of scrutinizing every release from a dam to determine when immunity attached. *Id.* Consequently, we do not look at the purpose or use of the project at the time of the damage. *Morici* requires that we look at what purposes Congress has authorized the project to perform. Although the dam at the time of Morici's injury was not performing a flood control purpose, the dam was a congressionally authorized flood control project and was therefore protected by § 702c immunity.

After *Morici* was decided, the Supreme Court issued the *James* opinion. After *James*, we addressed § 702c immunity in *McCarthy*. In *McCarthy*, the plaintiff was injured when he dove into a shallow area of a lake owned by the United States and fractured his neck. 850 F.2d at 559. Plaintiff argued that the government was negligent in failing to warn divers of the known risks. *Id.* at 559-60. We held that immunity applied and that the water in the lake was "flood water" because (1) the lake was a federal flood control project and (2) because the level of the lake was monitored daily and released through the dam when necessary. *Id.* at 561. Again, we expressly rejected the argument that immunity was determined by the current use of the federal flood control project. *Id.* at 561-62. Although the lake in *McCarthy* was being used primarily for recreational purposes at the time of McCarthy's injury, immunity attached because the lake was behind a dam constructed as part of a congressionally authorized flood control project. *Id.* at 562 ("So long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach.").

The most recent Ninth Circuit case dealing with flood control immunity is *East Columbia Basin*. In *East Columbia Basin*, an irrigation canal's retaining walls burst, flooding areas around Moses Lake, Washington. 105 F.3d at 519. The irrigation canal was part of the Columbia Basin Project that has flood control as one of its congressionally authorized purposes. *Id.* at 519-520. We held again that the congressionally authorized purpose of the project as a whole, not the actual purpose for which the project was being operated, was dispositive in determining whether immunity applied. *Id.* We concluded that the government had immunity because the canal was part of a larger project with flood control as one of its purposes.

After reviewing the *James* decision, we are not certain that § 702c should be construed as broadly as our prior decisions. The plain language of the definition of "flood waters" in *James* requires that the water be held in a federal flood control project "for purposes of or related to flood control." 478 U.S. at 605. Our decisions have focused on the "related to" language in the *James* definition and conferred very broad immunity. However, as explained above, the *Morici*, *McCarthy*, and *East Columbia Basin* cases seem to delete the second requirement in *James* and grant immunity if the water was contained in a federal flood control project.

Our prior holdings are not without support. As the Supreme Court noted in *James*, Congress drafted § 702c with the intent of conferring broad immunity. *Id.* at 607-08 (discussing the legislative history of § 702c). Congress was

willing to provide flood protections at great costs to the government but did not want to be liable for any costs other than construction. *Id.* Thus the broad immunity conferred by the "not wholly unrelated" test may be congressionally mandated. Additionally, other circuits have also adopted approaches similar to ours. *See Reese v. South Florida Water Management Dist.*, 59 F.3d 1128, 1130-31 (11th Cir. 1995) (holding that any water held in a flood control project is "flood water" regardless of the purpose for which the water is being used); *Boudreau v. United States*, 53 F.3d 81, 85-86 (5th Cir. 1995) (extending immunity to preclude claims for damages arising out of activities including management of recreational activities arising out of management of flood control project); *Fisher v. United States Army Corps of Engineers*, 31 F.3d 683, 684-85 (8th Cir. 1994) (holding that flood control immunity applies when government flood control activities is a substantial cause in the injury); *Dawson v. U.S.*, 894 F.2d 70, 73-74 (3d Cir. 1990) (adopting this circuits [sic] reasoning in *McCarthy*).

In light of our prior holdings, we are required to affirm the district court decision. The Madera Canal is part of the Central Valley Project which has flood control as one of its congressionally authorized purposes. As part of the Central Valley Project, the Madera Canal itself is a congressionally authorized flood control project. *See East Columbia Basin*, 105 F.3d at 520; *Morici*, 681 F.2d at 647. Although the water in the Madera Canal was not held for the purpose of flood control, because it was part of the Central Valley Project, it was "not wholly unrelated" to flood control. *See Morici*, 681 F.2d at 648. As interpreted by this circuit, § 702c immunity prevents suit for damage from flooding caused by the negligent construction and maintenance of irrigation canals that are part of a flood control project. *See East Columbia Basin*, 105 F.3d at 520.

Despite our decision to affirm, we recognize the harsh result of this decision. The "not wholly unrelated" test applied

by this and other circuits reads broadly an already broadly-written grant of immunity. There does not appear to be any set of facts where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project. Indeed, counsel for the government admitted at oral argument that she could not think of any situation where § 702c would not confer immunity.

The Madera Canal disburses irrigation water throughout the San Joaquin Valley. The canal is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c flood control immunity solely because it is a branch of the Central Valley Project. Consequently, Central Green is left without a tort remedy for damages to its crops and farming equipment caused by the government's alleged negligence in constructing and maintaining the Madera Canal.

We recognize that had this case been instituted in the Fourth, Seventh or Tenth Circuit the government would probably not enjoy flood control immunity. *See Fryman*, 901 F.2d at 82 (requiring that flood control activities increase the probability of injury before conferring immunity); *Boyd*, 881 F.2d at 900 (requiring a nexus between flood control activity and the damage incurred); *Hayes*, 585 F.2d at 702-03. In denying certiorari to a case that could have resolved the conflict in circuit opinions on this issue, Justice Stevens suggested that this split in the circuits could be "resolved more effectively by Congress." *Hiersche v. United States*, 503 U.S. 923, 925 (1992). While agreeing with Justice Stevens, we believe this case might be an appropriate subject for Supreme Court review.

V. CONCLUSION

For the reasons stated above, we affirm the dismissal of this action for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN CO., Plaintiff, UNITED STATES OF AMERICA; MADERA IRRIG. DISTRICT, Defendant.	No. CV-F-96-5541 REC ORDER GRANTING UNITED STATES' MOTION FOR JUDGMENT ON PLEADINGS AND DISMISSING UNITED UNITED STATES FOR LACK OF SUBJECT MATTER JURISDICTION

On August 25, 1997, the court heard the United States' Motion for Judgment on Pleadings.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein.

Plaintiff, Central Green Company, has filed a First Amended Complaint for Damages for Inverse Condemnation; Nuisance; Trespass; and Negligence. The First Amended Complaint alleges in pertinent part that plaintiff owns real property located in Madera County that has been used continuously for the production of pistachios; that the United States planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through plaintiff's property; that the Madera Canal was constructed or has been maintained in such a fashion that substantial amounts of water leak and have leaked from the Madera Canal causing substantial subsurface flooding of portions of plaintiff's property; that this subsurface flooding created an extremely shallow water table condition resulting in irreparable damage to portions of plaintiff's pistachio orchard, as well as increased farming and harvesting costs; that plaintiff has been told by defendants that the water seepage/leakage problem would be remedied; and that no remedial work or efforts have been taken. According to Exhibit B attached to the First Amended Complaint, the Madera Canal is part of the Friant Division, Central Valley Project. The parties do not dispute that one of the purposes of the Central Valley Project is flood control.

The United States has answered the First Amended Complaint and now moves for judgment on the pleadings on the ground of sovereign immunity.[1]

The Flood Control Act of 1928, 33 U.S.C. § 702c, provides in pertinent part:

> No liability of any kind shall attach to, or rest upon the United States for any damages from or by floods or flood waters at any place.

Involved in *United States v. James*, 478 U.S. 597 (1986) were accidents at flood control projects where recreational users of reservoirs were swept through water retaining structures when those structures were opened to release waters in order to control flooding. In construing Section 702c, the Supreme Court held that the terms "flood" and "flood waters" were not ambiguous in the context of accidents such as the ones at issue before the court:

> The Act concerns flood control projects designed to carry flood waters. It is thus clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood

---

[1] The United States also moved to dismiss the claim for inverse condemnation alleged in the First Amended Complaint on the ground that this claim must be brought in the Court of Federal Claims. Plaintiff concedes this issue and agrees to a dismissal without prejudice as against the United States so that the claim for inverse condemnation can be filed in the Court of Federal Claims.

control, as well as waters that such projects cannot control.

Id. at 605. In so construing Section 702c, the Supreme Court rejected an argument that the legislative history justified a departure from the "plain meaning" rule of statutory construction, commenting that the legislative history reinforces the plain language of the immunity statute:

> The Flood Control Act enacted 'a comprehensive ten-year program for the entire [Mississippi River] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds.' ... The Act was the Nation's response to the disastrous flood in the Mississippi River Valley in 1927. That flood resulted in the loss of nearly 200 lives and more than $200 million in property damage; almost 700,000 people were left homeless ... The flood control system in the Mississippi River Valley in response to this catastrophe was the largest public works project undertaken up to that time in the United States.

It is not surprising, in the light of the devastation wrought by the 1927 flood and the magnitude of Congress' undertaking, that the legislative history of § 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects. Numerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project. The Chairman of the House Rules Committee, in opening the discussion on the rule governing debate on the 1928 Act, stated:

'I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people -

and I assume it is a national responsibility - I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years.' ....

A number of other Congressmen unequivocally stated that the United States should not be liable for any expenses other than the direct cost of constructing the project ....

These statements show that the sweeping language of § 702c was no drafting inadvertence ... Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago .... § 702c's language 'safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.' ... The equally broad and emphatic language in the legislative history shows that Congress understood what it was saying.

Id. at 606-608.

Plaintiff argues that the United States in not entitled to the immunity granted by Section 702c because the seepage/leaking of waters from the Madera Canal at issue in this action are not waters carried through a federal flood control project "for the purposes of or related to flood control" but, rather, were waters being carried in the Madera Canal for irrigation purposes.

In *State of Washington v. East Columbia Basin Irr. Dist.*, 105 F.3d 517 (9th Cir. 1997), *petition for cert. filed*, 66 USLW 3017 (June 26, 1997), the Ninth Circuit affirmed the district court's dismissal on the basis of sovereign immunity of a suit brought by the State of Washington against the East

Columbia Basin Irrigation District. The District managed the East Low Canal, a canal constructed by the United States as part of the Columbia Basin Project. The Project's combined purposes are generating energy, irrigation of agricultural lands, and facilitation of flood control by regulating the amount of water released from the Grand Coulee Dam. In 1992, one of the retaining walls of the East Low Canal burst, causing flooding and damage. The Ninth Circuit set forth the standard for sovereign immunity:

> This circuit interprets 702c to immunize the government so long as the damage sustained is 'not wholly unrelated' to a project with flood control as one of its purposes ... Some circuits have found this standard too broad ... but it is unquestionably the law of this circuit and, contrary to the District's argument, has never been disapproved by the Supreme Court.
>
> Section 702c immunity therefore applies as long as plaintiff's damages: (1) are caused by a flood or flood waters (2) from a federal project with flood control as one of its purposes and (3) are 'not wholly unrelated' to the operation of the project.

In determining whether the water was "flood or flood waters", the Ninth Circuit stated:

> 'It is clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as waters that such projects cannot control.' [*United States v. James*, 478 U.S. 597, 605 (1986)]; *see also Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995)('Even assuming the water was released "solely for" or "only for" irrigation and other purposes, it was water contained within a multi-purpose federal flood control project, and *James* clearly held that all

> water in a federal flood control project is considered "flood water" if it is part of the project.').
>
> Under this broad definition, the waters that spilled from the East Low Canal were 'flood waters.' That they might not have been considered flood waters under state law is irrelevant.

Id. at 519. The Ninth Circuit then discussed whether the Columbia Basin Project had as one of its purposes flood control. *Id.* at 519-520. The Ninth Circuit then considered whether the damage was "not wholly unrelated" to the Project:

> The project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry. We need not determine whether flood control efforts contributed to the flood. See *Morici*, 681 F.2d at 648 (holding that 'the relationship between the flooding and a project Congressionally authorized for flood control ... is the controlling factor'); *Aetna*, 628 F.2d at 1204 (refusing to venture 'into the morass of "contributing causes," "superseding causes," and "intervening causes"') (quoting *Lunsford v. United States*, 570 F.2d 221, 228 n.13 (8th Cir. 1977).

Id. at 520.

Plaintiff argues that *East Columbia Basin* does not control the resolution of this issue. Plaintiff contends that both *East Columbia Basin* and *Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128 (11th Cir. 1995), cited with approval in *East Columbia Basin*, ignore the holding in *James* and, therefore, must be disregarded. Specifically, with respect to *East Columbia Basin*, plaintiff argues that its holding ignores the requirement set forth in *James* that the waters in the flood control project have been carried "for purposes of or related to flood control" and the conclusion in *McCarthy v. United States*, 850 F.2d 558, 561 (9th Cir. 1988):

> Given the definition of 'floodwaters' and 'damage' articulated in *James*, as well as standards we have set out in *pre-James* cases for determining the scope of § 702c immunity, we conclude that the immunity provision applies in this case. First, *James* made clear the term 'floodwater' is to apply to 'all waters contained in ... a federal flood control project for purposes of or related to flood control ... ' ... This definition of floodwater suggests that the term includes both 'waters that are out of control' and 'water at a flood control project' ... Thus, insofar as the waters of Lewisville Lake are clearly 'contained in' a federal flood control project and further, where the water level of the Lake is monitored on a daily basis and discharged when necessary, the waters herein satisfy the *James* definition of 'floodwater', and accordingly, fall within the meaning of the statute.

Plaintiff relies on this language from *McCarthy* in contending that the Ninth Circuit in *East Columbia Basin* did not determine whether the waters in the East Low Canal were being carried "for the purposes of or related to flood control" in concluding that the waters were "floodwaters". Plaintiff argues that, unless this determination is made, any water that happens to be carried in a flood control project is subject to Section 702c immunity irrespective of the purpose for which it is being carried. Plaintiff argues that such a conclusion contravenes the Supreme Court's statement in *James*.

Involved in *Reese* was a wrongful death action filed for the drowning death which occurred while the decedent was fishing in Lake Okeechobee after the Army Corps of Engineers opened a water control device to allow waters to flow downstream. The plaintiff argued that Section 702c did not apply to provide immunity because the water which caused the drowning was released by the United States for irrigational, agricultural and environmental purposes and not exclusively for flood control purposes. The Eleventh Circuit affirmed the district court's conclusion that the United States

was entitled to sovereign immunity, rejecting an argument that *James* was distinguishable because the Supreme Court found in *James* that the water involved was discharged to control flooding, while the water at issue in *Reese* was also used for irrigation and other purposes:

> Even assuming the water was released 'solely for' or 'only for' irrigation and other purposes, it was water contained within a multi-purpose federal flood control project, and *James* clearly held that all water in a federal flood control project is-considered 'flood water' if it is part of the project ... The periodic release of water is fundamental to the operation of a flood control project.

59 F.3d at 1130.

Plaintiff contends that *Reese* is incorrectly analyzed because it does not discuss whether the water in the lake was "for purposes of or related to flood control".

It is clear from plaintiff's brief that plaintiff's primary reliance is upon Judge Wanger's decision in *Sumner Peck Ranch. Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 744-745 (E.D.Cal. 1993):[2]

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[2] It is noted that *Sumner Pack Ranch* has been criticized by Judge Levi in *United States v. Iron Mountain Mines. Inc.*, 881 F.Supp. 1432, 1440 n.10 (E.D.Cal. 1995):

> RP relies on *Sumner Peck Ranch* ... to argue that the immunity only attaches if the particular waters causing damage 'are contained or carried through the project for "purposes of or related to flood control."' ... RP is correct that *Sumner Peck* appears to add as an additional requirement for immunity that the purpose of the water's conveyance be flood control. This additional requirement is not supported by Ninth Circuit case law. Although there may be some question how broadly to read *James*, in the Ninth Circuit, as discussed in text, it suffices for the immunity that the project is a flood control project and that the damage is related to the use

The first prong requires a determination that the water at issue can be termed 'floodwater' as used in § 702c ... The Supreme Court held in *James* that 'It is thus clear from § 702c's plain language that the terms "flood" and "floodwater" apply to all waters contained in or carried through a flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.' ....

The definition of 'floodwater' in *James* requires a two-part analysis: 1) is the water contained or carried through a federal flood control project; and 2) is it contained or carried through the project for 'purposes of or related to flood control'? In *McCarthy*, the Ninth Circuit found:

[I]nsofar as the waters of Lewisville Lake are clearly 'contained in' a federal flood control project and *further, where the water level of the Lake is monitored on a daily basis and discharged when necessary,* the waters herein satisfy the *James* definition of 'floodwater,' and accordingly, fall within the meaning of the statute.

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of the project. *McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988); *Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir. 1982). By adding an additional requirement for immunity *Sumner Peck* follows more nearly the rule adopted in the Fourth Circuit in *Haves v. United States*, 558 F.2d 701 (4th Cir. 1978). However, *Hayes* has been expressly rejected in both *McCarthy* and *Morici*. As the court noted in *Morici*, 'it is very difficult, if not impossible, as a practical matter to segregate particular ... water releases into precise categories of purpose.' *Morici*, 681 F.2d at 648 (quoting *Sanborn v. United States*, 453 F.Supp. 651, 659 (E.D.Cal. 1977)[)].

> ... As outlined above, the CVP can be considered a flood control project. Yet Federal Defendants have presented no evidence that the irrigation water supplied to Westlands was carried through the CVP for 'purposes of or related to flood control.' The presence of water or its conveyance through the CVP alone is not enough. If the sole purpose of the water's conveyance is irrigation, the water is not 'floodwater' and the immunity would not apply.

Plaintiff further argues that because the Ninth Circuit did not cite *Sumner Peck Ranch* in *East Columbia Basin*, this court should disregard *East Columbia Basin*.

This argument is without merit. *Sumner Peck Ranch* is not controlling on the Ninth Circuit or on this court. The court has no way of knowing why the Ninth Circuit did not address *Sumner Peck Ranch*, but it could well be that it did not because that case is still pending before Judge Wanger and has not yet been taken up on appeal.

Plaintiff's argument that the court should disregard very clear Ninth Circuit authority is misplaced, especially given the strong statements made by the Ninth Circuit in *East Columbia Basin*. Plaintiff further argues that it would be against public policy to provide immunity to the United States under Section 702c where damage is caused by waters released from a flood control project for irrigation purposes as opposed to flood control purposes. In this regard, plaintiff refers to the discussion of the legislative history in *James* quoted above and asserts that "a plain reading of the statute, congressional remarks and common sense dictates that this immunity does not apply to any and (all) damages claims caused by water passing through those projects and unrelated to the underlying purpose of flood control."

Plaintiff's argument is unpersuasive. The legislative history quoted above is very clear that the scope of the immunity is very broad. Plaintiff has cited nothing that allows the un-

dermining of the scope of that immunity when a multi-purpose project is involved.

ACCORDINGLY, IT IS ORDERED that the United States' Motion for Judgment on Pleadings is granted.

IT IS FURTHER ORDERED that the United States is dismissed from this action for lack of subject matter jurisdiction.

Dated: September 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTRAL GREEN COMPANY, a California Limited Partnership,	)	No. 97-17321
Plaintiff-Appellant	)	D.C. No. CV-96-05541-REC/SMS
v.	)	ORDER
UNITED STATES OF AMERICA; MADERA IRRIGATION DIST.,	)	
Defendants-Appellees.	)	

Before HUG, Chief Judge, B. FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott voted to deny the petition for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

Supreme Court, U.S.
FILED
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CLERK

No. 99-859

In the Supreme Court of the United States

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action arising from property damage sustained as a result of allegedly negligent construction and maintenance of an irrigation canal that is part of a multi-purpose federal flood control project.

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In the Supreme Court of the United States

No. 99-859

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 177 F.3d 834. The opinion of the district court (Pet. App. 10-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1999. A petition for rehearing was denied on September 7, 1999. Pet. App. 21. The petition for a writ of certiorari was filed on November 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Central Green Company, owns pistachio orchards in Madera County, California. Pet. App. 2. The Madera Canal, which is part of the Central Valley Project (CVP), a multi-purpose water project constru d by the United States and authorized by Congress for purposes including flood control, runs through petitioner's property. *Ibid.* The canal supplies water for irrigation from Millerton Lake, a reservoir created by Friant Dam on the San Joaquin River. Dep't of the Interior, *Central Valley Basin*, S. Doc. No. 113, 81st Cong., 1st Sess. 130-131 (1949). Like the Madera Canal, Millerton Lake and Friant Dam are part of the CVP. *Ibid.*

2. Petitioner brought this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Eastern District of California, alleging that negligent design, construction, or maintenance of the Madera Canal by the federal government resulted in leakage of water from the canal. That leakage, which in turn caused surface and subsurface flooding of petitioner's property, allegedly caused harm to petitioner's pistachio orchards and increased petitioner's farming and harvesting costs. Pet. App. 2.

The United States moved for judgment on the pleadings, arguing, *inter alia*, that the United States is immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702c *et seq.* Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

33 U.S.C. 702c.

The district court granted the government's motion for judgment on the pleadings. Pet. App. 20. Rejecting petitioner's contention that Section 702c did not apply because the waters carried through the Madera Canal are used for irrigation purposes and not for flood control, the district court observed that "[t]he legislative history [of Section 702c] * * * is very clear that the scope of the immunity is very broad." *Id.* at 19. The district court concluded that petitioner "ha[d] cited nothing that allows the undermining of the scope of that immunity when a multi-purpose project is involved." *Id.* at 19-20.

3. The court of appeals affirmed. Pet. App. 1-9. The court recognized that Section 702c "confers broad immunity for claims arising from the design, operation, or management of federally authorized flood control projects." *Id.* at 2. Petitioner's "sole argument" against application of the immunity here, according to the court, was that the water that damaged its property was not "flood water" within the meaning of the statute because it was held "for irrigation purposes rather than flood control." *Id.* at 3. The Ninth Circuit concluded that its own decisions, both before and after this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986), compelled rejection of that argument. Pet. App. 5-8.

The court of appeals identified what it characterized as an "apparent contradiction" in *James* itself regarding whether application of the immunity created by Section 702c depends upon the specific purpose for which water within a federal flood control project is being used at the time of an injury. Pet. App. 4 (noting this Court's favorable citation in *James* of both *Morici Corp.* v. *United States*, 681 F.2d 645 (9th Cir. 1982), and *Hayes* v. *United States*, 585 F.2d 701 (4th Cir. 1978)).

The court stated that, in the wake of *James*, "[t]he circuits disagree over the degree of relation the injury must have with flood control activities before immunity will attach." *Ibid.*

The court concluded, however, that its own prior decisions—which confer Section 702c immunity to injuries "not wholly unrelated" to flood control—dictated rejection of petitioner's contention that the purpose for which the water was used at the time of the injury should be viewed as controlling. Pet. App. 8. Although the court expressed uncertainty about whether its earlier decisions had interpreted *James* too broadly (*id.* at 7), the court observed that its longstanding "not wholly unrelated" test was supported both by Congress's intent to confer "broad immunity" in Section 702c and by the similar approaches adopted by several other circuits. *Id.* at 8.

ARGUMENT

Petitioner broadly asserts a conflict among the circuits on the meaning of 33 U.S.C. 702c. Although the courts of appeals have used different language in analyzing claims of immunity under this statute, no court of appeals has disagreed with the holding of the court below: that the federal government is immune from suit for property damages caused when flood waters escape from a multi-purpose project with flood-control as one of its purposes. In all relevant respects, this case is indistinguishable from *Washington* v. *East Columbia Basin Irrigation District*, 105 F.3d 517 (9th Cir.), cert. denied, 522 U.S. 948 (1997). In that case, as in this one, (1) the waters that caused the property damage were from an irrigation canal that was part of a multi-purpose project with flood control as one of its purposes; and (2) the plaintiff landowner could not

demonstrate that any other circuit would have ruled in its favor. This Court denied the petition for a writ of certiorari. 522 U.S. 948 (1997). Since that time, there has been no significant doctrinal development in the cases construing Section 702c that would warrant a grant of certiorari. The only difference between this case and *East Columbia Basin* is that the Ninth Circuit panel in this case openly expressed its disagreement with circuit precedent affording immunity. See Pet. App. 8-9. That is not a reason to grant further review.

1. The decision below correctly construes the Flood Control Act immunity provision, 33 U.S.C. 702c, in light of this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986).

a. When Congress embarked upon a multi-decade program to construct dams and other structures for flood control in 1928, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. See *James*, 478 U.S. at 607-608. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

In *James*, this Court broadly construed that clear assertion of immunity to extend both to property damage and to personal injury. 478 U.S. at 605. The Court interpreted the terms "flood and flood waters" to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Ibid.* The "sweeping language" of Section 702c and the "equally broad and emphatic language" of its legislative history supported recognition of a broad

immunity for the United States. *Id.* at 608. Accordingly, the Court concluded, "the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Ibid.*

b. This case involves property damage caused directly by water escaping from a federal flood control project. It thus lies squarely within the plain language of Section 702c and the decision in *James*. The statute provides immunity for "any damage *from or by* floods or flood waters at any place." 33 U.S.C. 702c (emphasis added). This Court made clear in *James* that "flood[s]" and "flood waters" include "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, *as well as to waters that such projects cannot control.*" 478 U.S. at 605 (emphasis added). That language encompasses property damage caused by waters escaping through seepage from a canal that is part of a federal flood control project. Moreover, protection of the United States from liability for flooding of land caused by alleged construction failures of a federal flood control project was central to Congress's concern in creating an immunity for federal flood control activities. See *id.* at 606-608; see also *id.* at 617 (Stevens, J., dissenting) (arguing that the immunity under Section 702c should extend *only* to "overflow damage to land"). Nothing in this Court's decision in *James* supports petitioner's contention that an entire project, one of whose purposes is flood control, may be subdivided into parts that would not be immune from liability for damage caused by flood waters.

2. Petitioner nevertheless contends that the court of appeals' decision misreads *James* by effectively eliminating any requirement for a factual nexus between an injury and federal flood control activities to support

immunity under Section 702c. See Pet. 14.[1] That contention is incorrect: the injury complained of in this suit (property damage) is asserted to have been proximately caused by the negligent construction of an irrigation canal that performs flood control functions. The extensive Central Valley Project (CVP) has been the subject of Section 702c litigation in the Ninth Circuit and its constituent district courts on many occasions, and has produced judicial decisions in which the project's flood control function and the relationship of that function to the project as a whole have been described. See, *e.g.*, *Morici Corp.* v. *United States*, 681 F.2d 645, 648 (9th Cir. 1982), aff'g 491 F. Supp. 466 (E.D. Cal. 1980); *Islands, Inc.* v. *United States Bureau of Reclamation*, 64 F. Supp. 2d 966, 969 (E.D. Cal. 1999); *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1439 (E.D. Cal. 1995). Those cases expressly rely on the integrated operation of the CVP's many components in finding immunity under Section 702c, and they give content to the court of appeals' ruling that the damage in question here is "not wholly unrelated to flood control." Pet. App. 8.

Indeed, as long ago as *Morici*, cited favorably by this Court in *James*, 478 U.S. at 605 n.7, the Ninth Circuit and the district court described the factual nexus between the project's flood control activities and its

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[1] Petitioner suggests (at 13-14) that in past filings we have drawn an "illusory" distinction between injuries traceable to a flood control project and those caused by flood control activities. The point of that distinction is that, when the government's flood control activities are not the proximate cause of the injury, courts of appeals have employed a variety of different linguistic formulas to determine whether the government enjoys immunity from suit under 33 U.S.C. 702c but those different tests have not caused different results. See note 6, *infra*.

other purposes in extending the immunity to damages caused by waters escaping from an irrigation component of the CVP. As the district court in the *Morici* case recognized, "[t]he Central Valley Project is operated as an integrated whole, rather than as a number of separate, isolated parts, because water releases at any one facility must be coordinated with releases at other facilities in that river basin." *Morici* v. *United States*, 491 F. Supp. at 490. The analysis in *Morici* formed the basis for the Ninth Circuit's more recent decision in *Washington* v. *East Columbia Basin Irrigation District*, 105 F.3d 517 (9th Cir.), cert. denied, 522 U.S. 948 (1997), which involved waters escaping from an irrigation component of another multi-purpose federal water project, the Columbia Basin Project.[2]

The circumstances of *Morici* are replicated here. The inherent nexus between flood control and damage caused by waters escaping from the integrated, multi-purpose CVP is evident from a Department of the Interior report prepared shortly after Friant Dam,

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[2] In its only published decision applying Section 702c since *James* where the damage was not caused by escaping waters—and where the nexus between the injury and flood control therefore could not be assumed—the Ninth Circuit explicitly acknowledged its reliance on the existence of such a linkage in concluding that the government was immune. The plaintiff in *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989), was injured in a diving accident that occurred in a lake that was part of a multi-purpose federal flood control project. In determining that Section 702c protected the government from liability, the court of appeals noted that the level of water in the lake was monitored on a daily basis to calibrate discharges for flood control purposes, and that therefore waters in the project "for purposes related to flood control were a *substantial factor* in bringing about McCarthy's injuries." 850 F.2d at 561-562 (emphasis added).

Millerton Lake, and the Madera Canal were placed in operation. See Dep't of the Interior, *Central Valley Basin*, S. Doc. No. 113, 81st Cong., 1st Sess. (1949). The report states that levees—the primary method of flood control in California's Central Valley before construction of the CVP—would "advantageously be supplemented by the operation of multiple-purpose reservoirs *and irrigation canals*." *Id.* at 162 (emphasis added). The role of the project's various components in achieving that flood control benefit was explained as follows:

> Reservoirs would be used *to store flood flows* until they could be released at rates within the capacity of the channels below, *or until they could be used to meet irrigation requirements.* Irrigation canals in some cases would be used to advantage to carry a portion of the flood flows away from the danger zones to areas where the water could be used beneficially. Such use of multiple-purpose structures for flood control is an important factor in the comprehensive plan for basin development.

Ibid. (emphasis added).

The report further explained that two sorts of floods occur in the Central Valley—those caused by rain and those caused by snow-melt. S. Doc. No. 113, *supra*, at 162. Both are controlled by maintaining sufficient water storage capacity in reservoirs behind dams. *Ibid.* When such storage space is used to store a rain flood, "it must be emptied as rapidly as possible" to make room for future, unpredictable rains. *Ibid.* Thus, "storage space reserved for such floods cannot be used for conservation [*i.e.*, irrigation] until after the rain-flood season." *Ibid.* The volume of snow-melt in any given year can be predicted several months in advance,

however, allowing operators of the CVP "to empty sufficient storage space in advance of the snow-melt run-off to prevent or reduce flood damage, with reasonable assurance that the reservoir will fill before the end of the storage season." *Ibid.* Thus, "[s]torage required for control of snow-melt run-off * * * is essentially conservation storage, *in that it is used to capture and retain water until needed for irrigation.*" *Ibid.* (emphasis added).

The report made clear that this is precisely how Friant Dam, Millerton Lake, and the Madera Canal operate. "Both rain and snow-melt floods on the main San Joaquin River and its principal tributaries * * * cause damage on the flood plains along the rivers, and in the Sacramento-San Joaquin Delta." S. Doc. No. 113, *supra*, at 164. Levees along the river were "inadequate to control even moderate floods," but "Millerton Lake (Friant) Reservoir on the San Joaquin River * * * now offers additional protection." *Ibid.* The report estimated that "the average damage from recurrent floods [along the San Joaquin River] would be $4,215,000 annually, under conditions prior to the beginning of the operation of Millerton Lake in 1944" but that "[t]his reservoir will reduce the annual damage by $279,000." *Ibid.* That flood control benefit directly results from the diversion of the waters of the San Joaquin River into *irrigation* canals fed by Millerton Lake—including the Madera Canal, which runs through petitioner's property. See *id.* at 130 ("the run-off of San Joaquin River will be made available for diversion at Friant Dam to Friant-Kern and Madera canals"). Indeed, virtually the entire flow of the San Joaquin River is diverted into those canals. *Natural Resources Defense Council* v. *Houston*, 146 F.3d 1118, 1123 (9th Cir. 1998) ("[s]ince the time that the dam was completed, the Friant unit has impounded the San Joaquin River water behind the Friant dam and diverted the water to surrounding irrigation districts," leaving "a dry stretch of San Joaquin riverbed" below the dam), cert. denied, 119 S. Ct. 1754 (1999).[3]

The court of appeals thus did not stray from this Court's definition of "flood waters" in *James* when it applied that definition to the water seeping onto petitioner's land from the Madera Canal. Not only was that seepage caused by waters that the CVP "[could] not control," but those waters were also "contained in or carried through a federal flood control project *for purposes of* or related to *flood control*." *James*, 478 U.S. at 605 (emphasis added). Thus, contrary to petitioner's assertions, the court of appeals has not applied Section 702c without regard to whether a factual nexus exists between the injury in question and the government's flood control activities.

3. The decision below is entirely consistent with the decisions of the other circuits articulating, in the wake of *James*, some form of factual nexus requirement as an essential predicate to immunity under Section 702c. When the various other circuits have concluded that the particular facts before them satisfy that nexus requirement, they have held the government immune from

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[3] As the foregoing references to S. Doc. 113 demonstrate, the court of appeals was incorrect in stating that "[t]he [Madera] canal is not a flood control project and serves no flood control purpose." Pet. App. 9 (quoted in Pet. 22).

suit.[4] In other cases, involving injuries more remotely related to federal flood control efforts, they have held

[4] *Reese* v. *South Fla. Water Management Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995) (government immune from suit in drowning at federal flood control lake caused by opening of water control device, noting that "periodic release of water is fundamental to the operation of a flood control project"); *Boudreau* v. *United States*, 53 F.3d 81, 84 (5th Cir. 1995) (based on facts of case, government immune from suit where there was a "sufficient association" between injury to recreational boater during Coast Guard rescue and activities of flood control), cert. denied, 516 U.S. 1071 (1996); *Holt* v. *United States*, 46 F.3d 1000, 1004 (10th Cir. 1995) (government immune from suit where there was a "sufficient nexus" between car accident and mist, which was created by water released from flood control project's dam and which caused an ice slick on an adjacent road); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683, 684 (8th Cir. 1994) (government immune from suit where shallow level of water as a result of operation of flood control project was a "substantial factor" in a recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (government immune from suit in recreational diving accident occurring at lake which, despite its commercial uses, had flood control uses as well and which was "monitored and maintained daily by the Army for the purpose of controlling floods"); *Zavadil* v. *United States*, 908 F.2d 334, 336 (8th Cir. 1990) (government immune from suit where water level at Gavins Point Dam, a part of a flood control project, was a "substantial factor" in a recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Fryman* v. *United States*, 901 F.2d 79, 82 (7th Cir.) (government immune from suit for injuries sustained at lake created as part of a flood control project which "increase[d] the probability" of injury), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (government immune from suit for recreational swimming accident caused by unsafe depth of water due in part to releases of water for flood control purposes); *Deuitt Bank & Trust Co.* v. *United States*, 878 F.2d 246, 247 (8th Cir. 1989) (government immune from suit where management of shallow waters at a flood control project was a "substantial factor" in causing injuries

the government subject to suit.[5]

Petitioner is incorrect (Pet. 18-23) that the tests articulated by other courts would produce a different result on the facts here.[6] In *Cantrell*, for example, a fisher-

sustained in diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (government immune from suit for drowning caused by deep water in a flotation channel that had been excavated for a flood control project).

[5] See *Kennedy* v. *Texas Utils.*, 179 F.3d 258 (5th Cir. 1999) (no immunity where injury occurred on dry land due to a condition with no association to flood control); *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity from claim by recreational boater injured by allegedly negligent driver of Army Corps of Engineers' boat); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for allegedly negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet come in contact with flood control project); see also *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992) (concluding, on basis of record evidence and language of authorizing statute, that particular project was not a flood control project).

[6] Although more tentatively than petitioner would have it (see *id.* at 18), the court of appeals similarly observed that the outcome "would probably" be different in certain other circuits. Pet. App. 9. But petitioner and the court below disagree about which ones. Compare Pet. 18 and Pet. App. 9. As we have previously noted in other briefs in opposition to certiorari, the courts of appeals employ slightly different linguistic formulations to determine whether the requisite factual nexus between the injury and the government's flood control project or activities has been established. See, *e.g.*, Br. in Opp. at 9 n.5, *Paulk* v. *United States*, No. 99-390 (filed Nov. 3, 1999). But here, as in those cases, the same

man sued the government for an injury from a crash by an Army Corps of Engineers boat that was transporting him after his own boat malfunctioned. In denying the government's assertion of Section 702c immunity, the court of appeals ruled that there must be a nexus between the allegedly tortious government conduct and flood control. See *Cantrell* v. *United States*, 89 F.3d 268, 273 (6th Cir. 1996). Contrary to petitioner's suggestion (at 18-19), that test is satisfied in this case. Petitioner's complaint alleged that the United States had negligently "designed," "maintained," and "operated" a canal that is part of an integrated multi-purpose flood control project, and that the government's negligence caused waters escaping from that project to damage petitioner's property. C.A. E.R. 4-8 (Compl. ¶¶ 16-34). Thus, even if Section 702c in all circumstances required a nexus between the allegedly tortious act and flood control activities, that nexus requirement would be satisfied here. See pp. 8-11, *supra*.

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result would have been reached under any of the prevailing approaches. Thus, the property damage injury here was "not wholly unrelated" to a project with flood control as one of its purposes. Pet. App. 8; *Washington* v. *East Columbia Basin Irrigation Dist.*, 105 F.3d 517, 520 (9th Cir.), cert. denied, 522 U.S. 948 (1997). Likewise, "governmental control of flood waters was a substantial factor in causing" petitioner's property damage, since releases of the flood control waters from Millerton Lake supplied the Madera Canal and those releases resulted from the capacity of the Friant Dam to retain flood waters. *DeWitt Bank & Trust Co.* v. *United States*, 878 F.2d 246, 247 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). And the injury was certainly "more likely" because of the "activities or characteristics" of a flood control project, both in terms of the volume of flood waters supplied to the Madera Canal as well as its design and construction as a means of controlling such waters for conservation/irrigation purposes. See *Bailey* v. *United States*, 35 F.3d 1118, 1124 (7th Cir. 1994).

Likewise, the test articulated by the Eighth Circuit is met here, contrary to petitioner's suggestion (at 19). In *Henderson*, a fisherman was swept away when water was released from a dam operated by the Army Corps of Engineers, which had contracted with a private power company that requested releases of waters at particular times to generate hydroelectric power. 965 F.2d at 1490-1491. But unlike this case, *Henderson* did not involve waters escaping from a multi-purpose project—a situation expressly covered by *James*, which defined "flood waters" to include "waters that such projects cannot control." 478 U.S. at 605. Rather, *Henderson* concerned the *controlled release* of waters for hydro-electric power generation. Thus, the Eighth Circuit's decision in *Henderson* was a straightforward application of the statement in *James* that the waters be "flood waters" that a flood control project "cannot control." *Ibid.* No such waters were at issue in *Henderson*, but they are at issue here.

Nor is it clear, as petitioner asserts (Pet. 19), that the Tenth Circuit would reach a different result on the facts here. That circuit declined to hold the government immune from suit in *Boyd* because it found an insufficient factual nexus between federal flood control efforts and a swimmer's death caused by a privately operated power boat in a federal flood control lake. See 881 F.2d at 900. As in *Henderson*, the theory of liability asserted against the government was a negligent failure to warn. That theory had no relation to the government's flood control activities. By contrast, the construction of the Madera Canal and its operation as an irrigation canal are directly related to the flood control purpose of the Central Valley Project. Thus, *Boyd* provides no reason to think that the decision below would have come out differently in the Tenth Circuit. See also *Holt*, 46 F.3d

at 1005 (Tenth Circuit holding government immune where injury was caused by flood control activities).

Finally, citing the pre-*James* decision in *Hayes*, petitioner asserts (at 21) that the outcome on the facts here would be different in the Fourth Circuit. In an unpublished decision issued after *James*, however, that circuit favorably cited not only the Ninth Circuit's *McCarthy* decision but numerous other post-*James* decisions applying a factual nexus test. See *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table), 1992 WL 67789, at *1. The court held there that Section 702c immunized the government from liability for a diving injury in a lake operated by the Army Corps of Engineers because the lake's multiple purposes included flood control and it was "constantly * * * monitored and maintained daily by the Army for the purpose of controlling floods."[7]

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[7] The court of appeals suggested a different list of circuits in which the outcome would "probably" be different on the facts here, omitting the Sixth Circuit but including the Seventh. See Pet. App. 9. Although petitioner acknowledges that "the issue is not settled in the Seventh Circuit" (Pet. 22), to the extent that that court "focused its inquiry" (*ibid.*) on whether "flood control activities increase[d] the probability of the plaintiff's injury" (*Bailey* v. *United States*, 35 F.3d 1118, 1124 (7th Cir. 1994)), that test is met here. The flood control benefit of impounding the waters of the San Joaquin River at Friant Dam is directly achieved by diverting water into the Madera Canal. See pp. 8-11, *supra*.

Likewise, petitioner is incorrect to assert that the government "likely would not be accorded immunity" in the Fifth Circuit. Pet. 22 (citing *Kennedy* v. *Texas Utils.*, 179 F.3d 258 (1999)). That case is readily distinguishable. As the court in *Kennedy* concluded, "[w]hile the term flood waters may be ambiguous and thus subject to differing interpretations, the ordinary and common meaning * * * does not, in our view, extend to an injury occurring on land apart from water and as the result of a use of the land itself." 179 F.3d at 261. The court there also cast no doubt on the continuing validity of *Boudreau*, in which the Fifth Circuit had upheld the government's immunity from a suit alleging negligence when the Coast Guard Auxiliary attempted to tow a stranded recreational vessel on a flood control lake because such actions constituted "the management of a flood control project." 53 F.3d at 85 (quoting *James*, 478 U.S. at 610).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

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REPLY OF THE PETITIONER

Certiorari should be granted because the circuits are irreconcilably divided over whether the Flood Control Act confers immunity on the government for damages caused by waters not carried "for purposes of or related to flood control," and because the Ninth Circuit's holding that immunity is conferred in that circumstance avowedly "delete[s]" an essential part of the holding of *United States* v. *James*, 478 U.S. 597 (1986). Because this case was dismissed on the pleadings, the lower courts accepted as true the allegation of the complaint that Petitioner's farm was damaged by irrigation waters rather than flood waters, but held that circuit precedent required dismissal solely because the waters were carried in a public works project that has flood control as one of its purposes.

Respondent does not seriously dispute that certiorari is warranted on that basis or that the circuit conflict is squarely presented in this case. Instead, precisely because it is so clear that several circuits would have refused to dismiss this case, Respondent in the Brief in Opposition ("BIO"), at 6-11, attempts to contend that the waters that damaged Petitioner's farm *were* flood waters. But Respondent never even attempts to explain why its argument is at all relevant given the procedural posture of the case, in which the allegations of the complaint to the contrary must be accepted as true. If Respondent's position were accepted, plaintiffs (including the United States) whose claims were dismissed as a matter of law would *never* be able to seek review in this Court because the brief in opposition would contest the complaint's allegations of fact. But that is of course ridiculous. Indeed, as we demonstrate in detail below, Respondent's argument is seriously disingenuous: the BIO fails to advise the Court that Petitioner repeatedly sought to present its evidence on this factual question in the lower courts, but Respondent successfully asserted that the allegations of the complaint should be accepted as true and the case dismissed as a matter of law. Nor does Respondent acknowledge that this Court repeatedly has rejected its

newfound factual position, concluding that the Friant Dam and Madera Canal serve irrigation functions and are not flood control facilities.

Because this case was dismissed taking as true that Petitioner's farm was damaged by irrigation waters, because Respondent does not seriously dispute that dismissal on that basis conflicts with this Court's decision in *James* as well as decisions of other circuits that have been faithful to *James*, and because there is no dispute that this issue recurs frequently and is an important and unresolved question of federal law, Pet. 23-25, the Petition for Certiorari should be granted.

1. Petitioner's Complaint alleges that the Madera Canal serves only irrigation purposes. Compl. ¶ 7. In moving for Judgment on the Pleadings based on the immunity provision of the Flood Control Act, Respondent "[a]ccept[ed] plaintiff's allegations as true" and frankly acknowledged that "[t]he Madera Canal is used to convey irrigation water to various lands in the San Joaquin Valley. Compl., ¶ 7." C.A. Ex. Rec. 139, 144. Respondent's position was that "the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley Project is dispositive." *Id.* 146. Specifically, "[t]he Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were used *solely* for irrigation." *Id.* 148 (emphasis added). Respondent steadfastly maintained that position on appeal, contending that "[t]he damage sustained by Central Green resulting from a water leak from the Madera Canal *that was used for irrigation* is well within this circuit's test for applicability of flood control immunity created by 33 U.S.C. § 702c." Resp. C.A. Br. 5 (emphasis added). Respondent made perfectly clear that "while the Madera Canal may have been used for irrigation purposes in this instance, the fact that it is a component of the Central Valley Project, a flood control project, results in immunity for the government for damage caused by leakage from the Madera Canal." *Id.* 14.

Petitioner, by contrast, always has contended that this Court's decision in *James*, 478 U.S. at 605, required Respondent to prove that the waters that damaged Petitioner's farm were carried in the Canal "for purposes of or related to flood control." Under the heading "Whether 702c Immunity Applies Is A Question Of Fact," Petitioner explained that "it is a question of fact as to whether or not the water that has damaged Central Green's property is flood water" and that dismissal was inappropriate because "defendants have presented *no evidence* to show the status of such water and accordingly, Plaintiff's claims must not be dismissed." C.A. Rec. 93 (emphasis added). Petitioner presented the same question as its only issue on appeal:

> Whether the District Court erred in holding that the immunity provision of the Flood Control Act of 1928 (33) U.S.C. §702(c) applied to bar CENTRAL GREEN's claims against USA, even though CENTRAL GREEN's Complaint expressly alleged that the cause of CENTRAL GREEN's damages was the water leaking from the Madera Canal which was being used for irrigation purposes not flood control?

Pet. C.A. Br. I. Petitioner explained: "Under the plain language of 33 U.S.C. §702(c) and the judicial interpretation applied by the Supreme Court in *United States* v. *James*, a question of fact exists as to whether USA is entitled to immunity. Accordingly, the District Court erred in granting USA's motion for judgment on the pleadings." *Id.* 4.

The lower courts found themselves bound by Ninth Circuit precedent to agree with Respondent that dismissal was required despite the fact that the government had disavowed any intent to prove that the waters that damaged Petitioner's farm were flood waters, and despite the fact that Respondent's position *precluded Petitioner* from presenting its evi-

dence that the waters served the purpose of irrigation. The district court thus granted Respondent Judgment on the Pleadings based on Ninth Circuit precedent holding that dismissal is required under the Flood Control Act if "[t]he project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry. *We need not determine whether flood control efforts contributed to the flood.*" Pet. App. 15a (citations omitted).

On appeal, the Ninth Circuit agreed:

> Although the water in the Madera Canal *was not held for the purpose of flood control*, because it was part of the Central Valley Project, it was "not wholly unrelated" to flood control. As interpreted by this circuit, § 702c immunity prevents suit for damage from flooding caused by the negligent construction and maintenance of irrigation canals that are part of a flood control project.

Pet. App. 8a (citations omitted) (emphasis added). The panel below repeated the point to emphasize that the government was being awarded immunity notwithstanding the assertion of the complaint, which Respondent pointedly refused to contest, that the Canal served only the purpose of irrigation:

> The Madera Canal disburses irrigation water through the San Joaquin Valley. *The canal is not a flood control project and serves no flood control purpose.* Despite having *no flood control purpose*, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project.

Id. 9a (emphasis added). The court emphasized that this holding not only "delete[d]" a clear requirement of this Court's decision in *James*, but also conflicted with decisions of several other circuits, and that this Court should accordingly grant certiorari to review the case. *Id.* 7a, 9a.

2. Based on the foregoing, Respondent's contention in the BIO, at 6-11, that the waters that damaged Petitioner's

farm *did* as a matter of fact serve a flood control purpose falls somewhere between irrelevant and seriously disingenuous. Thus, Respondent now maintains that certiorari should be denied because the Ninth Circuit was "incorrect" to conclude that "[t]he [Madera] canal is not a flood control project and serves no flood control purpose," BIO 11 n.3 (alterations in BIO), when it was *Respondent* that successfully insisted that the lower courts *accept* the assertion of the Complaint that the Canal served only purpose of irrigation, deem evidence on the purpose served by the Canal to be *irrelevant*, and *dismiss* the case as a matter of law. But having persuaded the lower courts not to resolve the factual question of the purpose served by the waters, Respondent cannot now evade the Ninth Circuit's square holding, which conflicts with *James* and decisions of other circuits and will result in considerable continuing uncertainty if certiorari is not granted, that the government has immunity for damages caused by non-flood waters.

Not only is Respondent's newfound factual assertion therefore irrelevant to the certiorari determination, but Respondent also fails to acknowledge that this Court repeatedly has rejected its claim that the Friant Dam and Madera Canal serve flood control functions. Thus, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950), explained that "[t]he Madera Irrigation District had been organized to build a dam at the Friant site and to divert San Joaquin waters *to irrigate* about 170,000 acres" (emphasis added). In *Gerlach*, the government unsuccessfully argued that the CVP, Friant Dam, and associated irrigation canals were a single integrated project with the overarching purpose of navigation or flood control, rather than "reclamation," *i.e.*, irrigation. This Court disagreed, explaining that Congress' broad declaration of purpose for the CVP, on which the Ninth Circuit has relied in deeming the entire CVP a flood control project, in reality "was intended to help meet any objection to its constitutional power to undertake this big bundle of big projects," not to turn each part of the CVP into a "flood control" facility. *Id.*

at 734. After an exhaustive review of the project's history, the Court concluded that "Congress realistically elected to treat it as a *reclamation* [*i.e.*, irrigation] project." *Id.* (emphasis added). The Court specifically came to that conclusion based on a review of the very 1949 Department of the Interior report now invoked by Respondent, which in fact explains that the Bureau of Reclamation had been assigned responsibility for "multiple purpose dams" such as the Friant Dam, in contrast to other "dams and other works *only for flood control* [that] are exclusively the responsibility of the Army Engineers." *Id.* (emphasis added). Decisions and opinions subsequent to *Gerlach* have consistently adhered to its description of the Friant Dam and Madera Canal as irrigation, not flood control, projects.[1]

Moreover, even the isolated excerpts from the Department of the Interior report invoked in the BIO in reality support Petitioner's view that waters are often released from the Friant Dam into the Canal for purposes of irrigation, not flood

[1] *See City of Fresno* v. *California*, 372 U.S. 627, 630 (1963) ("In *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), we were concerned with an issue regarding the nature of the Friant Dam unit of the Project and, contrary to petitioner's contention, concluded 'that Congress realistically elected to treat it as a reclamation project.'"); *Dugan* v. *Rank*, 372 U.S. 609, 613 (1963) ("The waters of the San Joaquin River are impounded by a dam constructed at Friant, approximately 60 miles upstream from Mendota. Friant Dam stores the water in Millerton Lake from which it is diverted by the Madera Canal on the north to Madera County and the Friant-Kern Canal on the south to the vicinity of Bakersfield for use in those areas *for irrigation* and other public purposes." (not referring to flood control) (emphasis added)); *see also California* v. *United States*, 438 U.S. 645, 680 (1978) (White, J., dissenting) ("One of the project's principal components is the Friant Dam, which interrupted the flow of the upper San Joaquin River, the impounded waters being distributed *to irrigate* lands not theretofore served by San Joaquin water." (emphasis added)).

control. Thus, the block quote from the report principally relied on by Respondent does not address the Friant Dam at all but, even assuming that it is relevant, it makes Petitioner's point clearly:

> Reservoirs would be used to store flood flows until they could be released at rates within the capacity of the channels below, ***or*** until they could be used to meet irrigation requirements. Irrigation canals in ***some cases*** [*i.e.*, not always or even necessarily often] would be used to advantage to carry a portion of the flood flows away from the danger zones to areas where the water could be used beneficially.

Dep't of the Interior, *Central Valley Basin*, S. Doc. 113, 81st Cong., 1st Sess. 162 (1949) (emphasis added).

Nor could Respondent find any support at all (including by making a representation on behalf of the Department of the Interior) for the proposition that flood control has been a principal purpose of the CVP generally or of the Friant Dam and Madera Canal specifically in the *fifty years* since the Department of the Interior's report. To the contrary, the project now operates in large part to capture waters to be used for irrigation in arid western lands, which is why the waters are released into irrigation canals rather than the preexisting river bed, and the CVP has as among its many stated purposes other than flood control "to protect, restore, and enhance fish, wildlife, and associated habitats," "water conservation," and "municipal and industrial power." Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992).[2]

[2] Respondent floats the idea that the judgment below could be defended on the ground, also not ever raised by the government below (or in any other case so far as we are aware), that immunity applies to *all* waters "that [flood control] projects cannot control," including those that were not carried for purposes of flood control. Respondent's rationale is that "the nexus between the injury and flood control [in that instance] could * * * be assumed." BIO 8 n.2.

3. Respondent's only remaining argument – that certiorari should be denied because the Court declined to review No. 96-2054, *East Columbia Basin Irrigation District* v. *United States* – is just as disingenuous as its newfound factual theory of this case. As the Petition explained and Respondent does not dispute, the government argued that the petition for certiorari in *East Columbia* simply did not implicate the circuit conflict because the plaintiff had presented only the question "whether a multi-purpose project may be subdivided into different parts, some of which enjoy Section 702c immunity and some of which do not." Br. of Resp. in Opp., No. 96-2054, *East Columbia Basin Irrig. Dist.* v. *United States* 5; Pet. 24 n.7. Indeed, as Respondent explained, the petitioner in that case did "not argue that [the] case would have been decided differently under any other circuit's approach." *Id.* Now Respondent untenably takes the *opposite* position that the *East Columbia* case would have resolved the circuit conflict and that the denial of certiorari in *East Columbia* must mean that, contrary to S. Ct. R. 10, the clear conflict in the circuits on this issue for some reason does not merit the Court's attention.

But that makes is illogical: if waters were contained in a flood control project for purposes unrelated to flood control (*e.g.*, for irrigation or recreation), why could it "be assumed" (indeed, why would it make sense to think at all) that the identical waters were related to flood control once they escaped from the project? For example, this argument would mean that the identical waters unrelated to flood control would give rise to immunity when they escaped (as when someone is swept away through a hole in a dam) but would not give rise to immunity so long as they remained contained within the flood control project (as when someone drowns in a flood control lake). Indeed, that is presumably why this Court in *James* rejected the government's argument that immunity attached to all waters that escaped from flood control projects. *See* Pet. 12-13 n.6.

Moreover, there have been several important developments since *East Columbia*. First and foremost, Respondent assured this Court in *East Columbia* that the conflict in the circuits was immaterial because every court of appeals *including the Ninth Circuit* limited immunity to circumstances in which there is "a connection between the government's management of flood waters and the injury in question." *Id.* at 8. But that assurance was false: once certiorari was denied in *East Columbia*, Respondent did not adhere to that position. Instead, it argued to the Ninth Circuit in this case that, for all waters in any project with flood control as one of its purposes, it "could not think of *any situation* where § 702c would not confer immunity," Pet. App. 9 (emphasis added), and that the requirement of *James* that the waters be carried "for purposes of or related to flood control" was entirely irrelevant, *see supra* (collecting Respondent's assertions below that the question whether an irrigation canal had a flood control purpose was immaterial). In addition, at the time certiorari was denied in *East Columbia*, there was some prospect that Congress would resolve the circuit conflict as suggested by Justice Stevens, *see Hiersche* v. *United States*, 503 U.S. 923 (1992), a possibility that Respondent now conspicuously declines to defend. Finally, the decision below makes plain that the circuit conflict is important and recurring subsequent to *East Columbia*, Pet. 23-25, a point that Respondent does not dispute.[3]

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[3] In fact, that is precisely the position Respondent recently took in acquiescing to certiorari in *Baral* v. *United States*, despite the fact that this Court had denied Respondent's own petition for certiorari on the identical issue in 1998. *See* No. 98-1667, *Balar* v. *United States*, Br. of the United States 14 n.3 (maintaining that certiorari should be granted because the "conflict in the circuits persists * * * and remains of continuing importance" despite the denial of certiorari in *New York Life Ins. Co.* v. *United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998)).

4. The proper disposition of this case therefore is obvious: the petition for certiorari should be granted and the judgment reversed because dismissal as a matter of law was inappropriate. Given the procedural posture of this case, the complaint should have been dismissed only if the Flood Control Act grants the government immunity even for waters not carried "for purposes of or related to flood control." But that proposition so plainly conflicts with *James* that Respondent does not seriously defend it or dispute that the square conflict with *James* merits review in this Court. There also is no question that this case would have been decided differently in several other circuits, *see* Pet. 13-23, given that the BIO's arguments in denying the conflict rest on its untenable factual premise that the waters that damaged Petitioner's farm served flood control purposes.[3]

CONCLUSION

For the foregoing reasons as well as those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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[3] *See, e.g.*, BIO 6-7 (no conflict with *James*' requirement of "a factual nexus between an injury and federal flood control activities" because "the injury complained of in this suit (property damage) is asserted to have been proximately caused by the negligent construction of an irrigation canal *that performs flood control functions*" (emphasis added)); *id.* 15 (no conflict with decisions of other circuits because "the construction of the Madera Canal and its operation as an irrigation canal are *directly related to the flood control purpose* of the Central Valley Project" (emphasis added)).

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No. 99-859

In the Supreme Court of the United States

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to Rule 15.8 of the Rules of the Court, the Solicitor General respectfully files this supplemental brief to bring to the Court's attention new matter.

In its reply brief, petitioner asserts that the United States has been "seriously disingenuous" (Pet. Reply 1, 5) in not properly acknowledging the procedural posture in which the case comes to this Court, and has made representations that are "false" (*id.* at 9). Petitioner is mistaken.

1. With respect to the procedural posture of the case, on page 2 of the brief in opposition we noted that "[t]he United States moved for judgment on the pleadings," which is exactly what the government did.

See C.A. R.E. 138.* Under Federal Rule of Civil Procedure 12(c), any party may move for judgment on the pleadings. On page 3 of our opposition, we note that "[t]he district court granted the government's motion for judgment on the pleadings."

Petitioner is mistaken for two reasons in asserting that in view of that procedural posture "the allegations of the complaint [that no flood waters were involved in causing the damage to petitioner's property] must be accepted as true." Pet. Reply 1. First, the complaint does not contain any such allegation. While petitioner asserts that the "Complaint alleges that the Madera Canal serves *only* irrigation purposes," *id.* at 2 (emphasis added), the Complaint in fact alleges that the Madera Canal "is used to convey irrigation water to various lands in the San Joaquin Valley" (¶ 7); it does not allege that the waters were not also flood waters, C.A. R.E. 2. Indeed, the allegations of the Complaint are wholly consistent with our view that the presence of the water in the canal served both flood control and irrigation purposes.

Second, the characterization of waters in this case as "flood waters" for purposes of the Flood Control Act of 1928, 33 U.S.C. 702c, is not a "fact" as to which the plaintiff's allegations must be taken as true for purposes of a Rule 12(c) motion. As our motion for judgment on the pleadings itself noted, "a court need not 'assume the truth of legal conclusions merely because they are cast in the form of factual allegations.'" C.A. R.E. 143 (quoting *Western Mining Council* v. *Watt*, 643 F.2d 618, 624 (9th Cir.) (citations omitted), cert. denied,

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* References to C.A. R.E. are to Central Green's Excerpts of Record filed by petitioner in the court of appeals. For the convenience of the Court, we have lodged copies of it with the Clerk.

454 U.S. 1031 (1981)). Thus, even if the Complaint *had* alleged that the waters that caused the damage to petitioner's property were irrigation waters *and therefore not flood waters*, such an allegation would be just such a legal conclusion cast as a factual allegation. In any event, the district court expressly concluded that "[t]he parties do not dispute that one of the purposes of the Madera Canal is flood control." C.A. R.E. 124-125.

Moreover, there is no basis for petitioner's contention that the brief in opposition "fails to advise the Court that Petitioner repeatedly sought to present its evidence on this factual question in the lower courts, but Respondent successfully asserted that the allegations of the complaint should be accepted as true and the case dismissed as a matter of law." Pet. Reply 1. The district court filings in this case do not support petitioner's assertion of having "repeatedly sought to present its evidence." *Ibid.* See C.A. R.E. (collecting court submissions). In the district court, petitioner never offered such evidence but only argued that the United States had the burden to prove that the waters were "flood waters" and that the government had failed to carry its burden. See C.A. R.E. 93. Petitioner has not identified any evidence that it attempted to present but was precluded from presenting. Our position then and now was that the Complaint should be dismissed assuming its allegations were true.

2. The government's longstanding position has been that waters carried in a multi-purpose project (of which flood control is one purpose) do not cause the government to lose immunity under the Flood Control Act simply because the principal purpose of a part of the multi-purpose project may be something (like irrigation) other than flood control. As for the Central Valley Project (CVP), of which the Madera Canal and

Friant Dam are a part, the law has been well-settled in the Ninth Circuit that the CVP "flood control function and the relationship of that function to the project as a whole have been described." Br. in Opp. 7 (citing cases). The government's reliance on those cases in the district court and court of appeals is completely proper advocacy. The fact that the government explained to the district court in this case that it need not conduct fact-finding on whether the waters that caused property damage to petitioner's property were "flood waters" simply reflected that well-established case law.

Indeed, contrary to petitioner's assertion (Pet. Reply 2) that the United States is making an argument in this Court inconsistent with its position in the district court and court of appeals, the government's motion for judgment on the pleadings makes precisely the same argument. That motion states: "Accepting plaintiff's allegations as true, this Court should hold plaintiff's claims barred by section 702c because the Madera Canal is part of a federal flood control project, plaintiff's alleged injury was not wholly unrelated to the [Central Valley] Project's operation, and an alleged cause of the injury was floods or flood waters." C.A. R.E. 144-145. The government's motion goes on to aver that "the Madera Canal's conceded status as part of the Central Valley Project establishes the requisite flood control nexus." *Id.* at 145. Our motion for judgment on the pleadings cites the uniform line of cases that have taken judicial notice of the fact that the CVP "has a federal flood control purpose" (*id.* at 146) and thus that property damage caused by flooding from CVP components qualifies for immunity under the Flood Control Act. *Ibid.*

Our brief in opposition in this Court is consistent with that view, and we dispute the contention in the

petition reply (at 5) that we have been in any way "disingenuous." Because the settled understanding of the Ninth Circuit as to the flood control functions of the CVP has no controlling weight in this Court, we recited Congress's purpose in establishing the CVP, with citations to the Department of the Interior report, to support our position that the "irrigation waters" in the Madera Canal are simply released "flood waters" made available from time to time by discharges from the Friant Dam. "The inherent nexus between flood control and damage caused by waters escaping from the integrated multi-purpose CVP" (Br. in Opp. 8) is not a "newfound factual assertion" (Pet. Reply 5), but rather our longstanding legal position.

In our view, the fact that the Madera Canal is principally used for irrigation does not change the analysis under the Flood Control Act. The release of flood waters from the Friant Dam in part contributes to making irrigation from the Madera Canal possible. Such releases do not irrevocably transform those waters into something that would deny the government immunity under the Flood Control Act. Contrary to petitioner's assertion (Pet. Reply 5-6 & n.1), none of the Supreme Court cases cited holds that irrigation is the *only* purpose of the Madera Irrigation District. See *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 753 (1950); *City of Fresno* v. *California*, 372 U.S. 627, 630 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 613 (1963).

3. The petition reply (at 7 n.2) asserts that we raise a new argument in the brief in opposition to defend the judgment below—that "immunity applies to *all* waters 'that [flood control] projects cannot control'"—and that the government is not believed ever before to have taken that position. Pet. Reply 7 n.2. Again petitioner is mistaken. First, the government's briefing for judg-

ment on the pleadings made the very same argument. See C.A. R.E. 76 (arguing, in the alternative, that "the leaking canal waters are 'waters that such projects cannot control' under *James*"). Second, contrary to petitioner's statement that this argument has not been raised "in any other case so far as we are aware" (Pet. Reply 7 n.2), the record excerpts filed by petitioner in the court of appeals disprove the assertion it is now making. The appendix to the United States' motion for judgment on the pleadings *in this case* contains an order in an analogous case (*Johnston* v. *United States*, No. CIV F 96-5484 (E.D. Cal. Dec. 31, 1996)), in which the district court had accepted the very same argument. See C.A. R.E. 157 ("The record demonstrates that the damage to Plaintiff's lands was caused by waters which could not be controlled by the ponding basin adjacent to the San Luis Canal.").

4. The petition reply (at 8) is also mistaken in asserting that we have changed positions from the argument we made in successfully opposing certiorari in *East Columbia Basin Irrigation District* v. *United States*, 522 U.S. 948 (1997) (No. 96-2054). The only material difference between the petition in that case and the one in this case is that petitioner's counsel in *East Columbia Basin*—a distinguished law professor at Emory University—did not contend (as does petitioner in this case) that the result would have come out differently in the other circuits asserted as conflicting in the *Central Green* petition. As we noted in *East Columbia Basin*, petitioner there did not "argue that [the] case would have been decided differently under any other circuit's approach." 96-2054 Br. in Opp. at 10. The apparent difference in views among the petitioners in *East Columbia Basin* and in this case does not support the conclusion that the *government* has

changed its position. Had petitioner in *East Columbia Basin* argued that the cases invoked for an alleged conflict in fact did conflict, we would have taken the position expressed in our brief in opposition in this case, that "no court of appeals has disagreed with the holding of the court below: that the federal government is immune from suit for property damages caused when flood waters escape from a multi-purpose project with flood-control as one of its purposes." Br. in Opp. at 4. Furthermore, petitioner offers no support for the assertion in its reply brief (at 9) that "at the time certiorari was denied in *East Columbia*, there was some prospect that Congress would resolve the circuit conflict as suggested by Justice Stevens, *see Hierche* v. *United States*, 503 U.S. 923 (1992)." This Court denied certiorari in *East Columbia* only slightly over two years ago (and five years after *Hiersche*), and there has been no intervening legal development to warrant a different outcome here.

We take very seriously the statements in petitioner's reply that representations made by the United States are "false" (Pet. Reply 9) and "seriously disingenuous" (*id.* at 1, 5). It appears that petitioner has been led by disagreement with us on a question of law to the mistaken view that we have misrepresented and failed to disclose facts to the Court. The United States has argued, and the district court and court of appeals have agreed, that even if irrigation is the principal purpose of the Madera Canal, its waters have the relationship to flood control or flood waters required by the Flood Control Act, because flood waters are held by the Friant Dam until discharged into the Madera Canal, the discharge is at times necessary for flood control purposes, and the discharge enables the irrigation function of the canal to proceed. Petitioner apparently disagrees with

that view of the statutory term "flood waters," contending that if waters serve an irrigation function they are by virtue of that fact not flood waters. That difference of opinion should not be transformed into a charge of misrepresentation or disingenuousness.

* * * * *

For the foregoing reasons, and those stated in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MARCH 2000

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No. 99-859

IN THE

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United States of America,

Respondent.

On Petition for a Writ of Certiorari
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for the Ninth Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONER

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March 10, 2000

QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

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SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner respectfully submits this Supplemental Brief to respond to the Supplemental Brief filed by Respondent on March 10, 2000.

* * * *

1. Before addressing the substance of the government's supplemental filing, it is most important to make clear that Respondent's arguments are irrelevant to the determination whether certiorari should be granted. Putting aside the parties' disagreement about what the government did or did not argue below, several points are indisputable. First, the Ninth Circuit categorically held in this case that the Flood Control Act confers immunity despite the fact that the Madera Canal "is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project." Pet. App. 9a (emphasis added). Second, the Ninth Circuit correctly recognized (as have Justice Stevens and three other circuits, Pet. 17) that the Ninth Circuit's standard for awarding immunity conflicts with not only a decision of this Court but also decisions of several other circuits. Pet. App. 5a, 9a. Third, as the numerous decisions of the lower courts and indeed Respondent's own filing in an earlier case demonstrate, this is an important question that recurs frequently. Pet. 23-25. Fourth, by granting certiorari this Court would resolve the conflict. Because the lower courts dismissed this case on the pleadings, this case is not muddied by disputes over the status of the water involved and instead squarely presents the purely legal issue on which the lower courts are divided: whether the government must prove a factual nexus to flood control functions. If the Court decides that such a nexus is required (as *United States* v. *James*, 478 U.S. 597, 605 (1986), plainly states it is) then the case will be remanded for determination of that factual issue.

2. The import of Respondent's Supplemental Brief is that it "take[s] very seriously the statements in petitioner's reply that representations made by the United States are 'false' (Pet. Reply 9) and 'seriously disingenuous' (*id.* 1, 5)." Rightly so. To the extent that Petitioner's Reply caused offense, we certainly apologize. Petitioner's counsel have twice appeared with the United States as *amicus* on the merits in this Term and have made clear their extraordinary respect for the work of the Solicitor General, a point that we repeat here so that there is no ambiguity. But the Reply made those statements not based on a "disagreement with [the government] on a question of law," Supp. 9, but instead because of the sincere conviction based on a thoroughgoing review of the record that the BIO should have been more forthcoming.

3. As to the substance of Respondent's supplemental filing, the government's error is plain in light of the issue on which the circuits are divided. This Court held in *James* that the Flood Control Act confers immunity only for "waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as waters that such projects cannot control." 478 U.S. at 605. Several circuits therefore require proof that the water has a nexus to both a "federal flood control project" *and also* "purposes of or related to flood control." Pet. App. 5a, 9a; Pet. 18-23. The Ninth Circuit, by contrast, avowedly has "delete[d]" the second part of the *James* formulation and requires only proof that the waters are not "wholly unrelated" to a flood control project. Pet. App. 7a-8a.

As the Petition and Reply explained in great detail through numerous quotations from the government's filings in the lower courts, Respondent's position below was that it was entitled to immunity under settled Ninth Circuit precedent so long as there was a nexus to a "federal flood control project." Pet. 5-7; Reply Br. 2-3. Respondent never maintained that the waters that damaged Petitioner's farm served a flood control purpose. Particularly relevant to the govern-

ment's position in this Court, Respondent never *mentioned* even in passing its principal argument in this Court that the Friant Dam holds snow and rain melts that subsequently are released into the Madera Canal. *Compare* BIO 6-11.

Respondent is correct that its Motion in the district court did go beyond the pleadings (and Petitioner's Reply Brief never contended otherwise), Supp. 3, but is not correct about the substance of the government's argument below. The complaint in this case alleges that Petitioner was damaged by irrigation water leaking from the Madera Canal.[1] Nothing in

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[1] C.A. Rec. 2 (Compl. ¶ 7 ("Plaintiff is informed and believes and thereon alleges that defendant UNITED STATES planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through Plaintiff's property as shown in Exhibit 'A.'")). Respondent cannot seriously assert that the complaint was somehow ambiguous because it "does not allege that the waters were not also flood waters." Supp. 2. The complaint adverts to only a single kind of water. Indeed, that was Respondent's express understanding of the complaint in the district court, the court of appeals, and indeed in the BIO. C.A. Rec. 146 (Motion 9 ("It is the Central Valley Project's flood control purpose, not the component's non-flood-control purpose, that governs. Under the well-settled Ninth Circuit rule [citations omitted] the Madera Canal's irrigation purpose is immaterial, and plaintiff's judicial admission that the Madera Canal is a component of the Central Valley Project is dispositive.")); *id.* 11 ("The Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were used *solely* for irrigation." (emphasis added)); Gov't C.A. Br. 5 ("The damage sustained by Central Green resulting from a water leak from the Madera Canal that was used *for irrigation* is well within this circuit's test for applicability of the flood control immunity created by 33 U.S.C. § 702c." (emphasis added)); *id.* 6 ("In *Morici Corp.* v. *United States*, 681 F.2d 645 (9th Cir. 1982), which like this case concerned the Central Valley Project, the Court held that damage caused by a multipurpose water project authorized for flood control is within the scope

the complaint asserted that the Canal was part of the Central Valley Project. In moving for Judgment on the Pleadings, the government therefore had to go beyond the text of the complaint to establish that (a) the Madera Canal was part of the CVP (through an exhibit to the complaint), and (b) the CVP had flood control among its authorized purposes (through earlier Ninth Circuit decisions).[2] Respondent thus went beyond the pleadings to establish only that the first part of the *James* formulation was satisfied in this case, which it successfully maintained was the sole relevant issue under Ninth Circuit precedent.

Respondent did *not*, as it now suggests, attempt in its Motion to go beyond the pleadings to establish that the *second* part of the *James* test was satisfied, *i.e.*, that the Madera Canal served a flood control function.[3] But that is precisely

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of § 702c immunity even if the particular component of the project that caused the damage was used *exclusively for other purposes*." (emphasis added)); BIO 2 ("The canal supplies water for irrigation from Millerton Lake, a reservoir created by Friant Dam on the San Joaquin River.").

[2] *See* C.A. Rec. 139 (Motion 2 (only statement of fact not drawn from the text of the complaint: "The Madera Canal is part of the Central Valley Project. Compl., Exhibit B, at 1, first 'Whereas' paragraph.")); *id.* 145 (Motion 8 ("In a facial attack, documents attached to the complaint are part of the complaint.") (citations omitted)).

[3] Indeed, its statement of the appropriate legal standard precluded such an argument. The government maintained that the district court, in resolving a Motion for Judgment on the Pleadings, must determine whether the defendant's challenge was (a) "facial," permitting dismissal only if "the plaintiff can prove no set of facts in support of his claim," or (b) "factual," in which case "the court can hear conflicting evidence." C.A. Rec. 141 (Motion 4 (citation omitted)). Every indication from the face of the Motion is that Respondent regarded it as "a facial attack," in which the plaintiff's allegations must be resolved in its favor. C.A. Rec. 142 ("[i]n a facial attack the court is not limited strictly to the face of the com-

what it attempted to do in the Brief in Opposition in order to establish that (contrary to the conclusion of the panel in this case) the decision below does not conflict with *James* or decisions of other circuits. *See* BIO 11-16. Respondent says in its Supplement that "we recited Congress's purpose in establishing the CVP, with citations to the Department of the Interior report, to support our position that the 'irrigation waters' in the Madera Canal are simply released 'flood waters' made available from time to time by discharges from the Friant Dam." Supp. 6; *see also id.* ("The release of flood waters from the Friant Dam in part contributes to making irrigation from the Madera Canal possible."). Our point is simply that the government did not make that argument in the lower courts and should have so-advised this Court. To repeat, Respondent contended below that it was entirely irrelevant whether the waters in question were flood waters, and that the government was required to prove *only* that the first part of the *James* test was satisfied. Thus, the government's unambiguous position in its Motion and its reply (which the district court accepted) was that the government is entitled to immunity notwithstanding that the waters in question were used only for irrigation purposes. C.A. Rec. 146 ("[Ninth Circuit

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plaint"); *id.* ("Additionally, in a facial attack a District Court may rely on exhibits to the complaint."); *id.* 144 ("[a]ccepting plaintiff's allegations as true, the Court should hold plaintiff's claims barred by section 702c"); *id.* 145 ("In a facial attack, documents attached to the complaint are part of the complaint."). In point of fact, it is not possible to construe the government's Motion as a "factual" attack – in which the district court could resolve whether Petitioner was damaged by flood waters – for the simple reason that *Respondent did not attempt to introduce any evidence for the district court to consider*. Certainly, the district court did not regard this factual dispute as before it. Pet App. 15a (finding that dismissal was required under holding of *East Columbia*, *supra*, that "'[t]he project has flood control as one of its purposes, and the events giving rise to the action were not wholly unrelated to the project. That ends our inquiry.'").

precedent] asks whether the alleged injury is related to the project (here, the CVP), *not* whether it is related to a project use for the specific purpose of flood control." (emphasis in original)); *id.* 148 ("The Ninth Circuit holds the government immune from damage caused by waters in a flood control project, even if those waters were [sic, used] *solely* for irrigation." (emphasis added)).

The government could not make its change in position clearer than in the closing to its Supplement. The government states, without any citation to its briefs below, to the district court's opinion, or to the court of appeals' decision, that "[t]he United States has argued, and the district court and court of appeals have agreed, that even if irrigation is the principal purpose of the Madera Canal, its waters have the relationship to flood control or flood waters required by the Flood Control Act, because flood waters are held by the Friant Dam until discharged into the Madera Canal, the discharge is at times necessary for flood control purposes, and the discharge enables the irrigation function of the canal to proceed." Supp. 9-10. We have already documented the government's failure to make this argument in the lower courts, and it could not be more clear that the lower courts manifestly did *not* accept such a contention. To the contrary, the Ninth Circuit categorically held in this case that the Flood Control Act confers immunity despite the fact that the Madera Canal "is not a flood control project and serves no flood control purpose. Despite having no flood control purpose, the Madera Canal enjoys § 702c immunity *solely* because it is a branch of the Central Valley Project." Pet. App. 9a (emphasis added).[4]

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[4] Respondent now cites for the first time, Supp. 3, the district court's passing statement in entering a judgment under FRCP 54 that "[t]he parties do not dispute that one of the purposes of the Madera Canal is flood control," when the government knows well that Petitioner has maintained throughout this litigation that the Canal serves only irrigation functions. The district court's statement simply reflects its legal conclusion that the government automatically is entitled to immunity because the Canal is part of the CVP, a point made clear from its decision awarding immunity. Pet. App. 11a ("According to Exhibit B attached to the First Amended Complaint, the Madera Canal is part of the Friant Division, Central Valley Project. The parties do not dispute that one of the purposes *of the Central Valley Project* is flood control." (emphasis added)).

4. Respondent next disputes that Petitioner sought to put on its evidence that the Madera Canal serves an irrigation, not flood control, function. Petitioner's Reply collected its repeated assertions to that effect in the district court and court of appeals. Reply 3. Respondent now claims that "[i]n the district court, petitioner never offered such evidence," Supp. 4, but the obvious reason for that fact is that the district court *refused to hold a hearing*, notwithstanding Petitioner's unambiguous position that "Whether 702c Immunity Applies Is A Question Of Fact." C.A. Rec. 93 (emphasis omitted). What else was Petitioner supposed to do when the district court accepted the government's position that evidence was irrelevant? Certainly, we could not agree more that "[t]he fact that the government explained to the district court in this case that it need not conduct fact-finding on whether the waters that caused property damage to petitioner's property were 'flood waters' simply reflected [the Ninth Circuit's] well-established case law." Supp. 4-5. Petitioner's point is simply that Respondent should have advised *this Court* that it successfully took the position in the district court that no fact-finding should be undertaken rather than asserting in the BIO that, for example, "the court of appeals was incorrect in stating that '[t]he [Madera] canal is not a flood control project and serves no flood control purpose,'" BIO 11 n.3, as if some factual development had been undertaken. Moreover, the import of the parties' disagreement is that the district court did *not* hear evidence on this factual question, which will remain open on remand.

5. Finally, we direct the Court's attention to a series of its precedents addressing the question whether the Madera Canal serves irrigation or flood control purposes. *See* Reply 5-6 & n.1 (citing *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Dugan* v. *Rank*, 372 U.S. 609 (1963); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)). Respondent says only that "none of the Supreme Court cases cited holds that irrigation is the *only* purpose of the Madera Irrigation District." Supp. 7 (emphasis in original). We disagree, but in any event that was not the point of the Reply. Instead, Petitioner argued that Respondent should have *acknowledged* these decisions (one of which addresses the very Department of the Interior report on which the government relies), which *do* reject the claim that the entire CVP serves flood control functions including specifically with respect to the Friant Dam and the Madera Canal. *E.g.*, *Dugan*, 372 U.S. at 622 ("From the very beginning it was recognized that the operation of Friant Dam and its facilities would entail a taking of water rights below the dam. Indeed, it was obvious from the expressed purpose of the construction of the dam – to store and divert to other areas the waters of the San Joaquin – and the intention of the Government to purchase water rights along the river."); *Gerlach*, 339 U.S. at 733 (components of the CVP "are not only widely separated geographically, many of them physically independent in operation"); *id.* at 736 (rejecting government's argument that statement of purpose that CVP served navigation and flood control "is applicable to Friant Dam and related irrigation facilities as an integral part of 'what Congress quite properly treated as a unit'").

* * * * *

We take care to reiterate that Petitioner's Reply Brief was not intended to cause offense to the office of the Solicitor General. The Reply was intended to make abundantly clear that this case squarely presented the important circuit conflict over the scope of the government's immunity under the Flood Control Act, and to take issue with Respondent's suggestion

to the contrary. Our concerns in the Reply were substantial, but certainly not personal.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition and the Reply, the Petition for Certiorari should be granted.

Respectfully submitted,

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No. 99-859

In the
Supreme Court of the United States

CENTRAL GREEN CO.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the United States benefit from flood control immunity for damage caused by waters held and released only for irrigation purposes?

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae.[1] Written permission to file this brief has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PLF seeks to augment the arguments of Petitioners by discussing the factors that make intercircuit conflicts intolerable, and addressing why the conflict should be resolved in this case. PLF believes its public policy perspective and

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

litigation experience will provide an additional viewpoint on the legal issues presented.

STATEMENT OF THE CASE

The Central Green Company owns 1,000 acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Leaks in the canal have damaged Central Green's orchard. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the canal. Central Green sued the United States and the Madera Irrigation District under the federal Tort Claims Act, alleging that negligent planning, design, construction, or maintenance led to the leaks that caused surface and subsurface damage to Central Green's property.

The United States responded by claiming immunity under section 702c of the Flood Control Act, which prevents suits "for any damage from or by floods or flood waters at any place." Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The district court and the Ninth Circuit ruled that, because the Madera Canal is part of a project that Congress authorized for flood control purposes, section 702c immunizes the United States from suit, even though the Madera Canal itself is not used for flood control, and the leaks at issue here were not caused by flood conditions.

SUMMARY OF ARGUMENT

The Flood Control Act of 1928 provides, in part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. Because the Circuit Courts have

adopted conflicting interpretations of the phrase "from or by floods or flood waters," plaintiffs in some circuits are denied remedies that are available in other circuits. This Court should grant the petition to resolve this conflict.

Under guidance from Congress, legal scholars have studied circuit conflicts to determine which conflicts are so intolerable as to require resolution. The study claims that conflicts between the circuits are most intolerable where the conflict leads to different outcomes for litigants in different circuits, as the conflict presented in this case does. This conclusion has less to do with the importance of the issue involved than with the impact of the conflict upon litigants. The study concluded that the most intolerable of conflicts are those that are outcome-determinative; the difference in the rules applied in the different circuits determines which party wins. The conflict presented in this case is intolerable because it determines the very availability of a remedy. Because of the importance of consistency in the application of federal law, conflicts, like this one, require resolution.

This issue will not benefit from further "percolation." The conflict has persisted for many years, despite many judicial interpretations, and notwithstanding pointed invitations for Congress to resolve the issue. Circuit courts have expressly rejected the reasoning of other circuits. There is no reason to think that resolution in some other manner is forthcoming.

Lastly, this Court should resolve the conflict because Congress has not. The law is on the books and affects real litigants, such as the Petitioner. Even if the immunity provision aches for congressional clarification, the judiciary must work with what it has. In this case, the Flood Control Act has provided a grant of immunity that has generated a snarl of interpretations that both helps and harms comparable plaintiffs merely on the basis of geography. Determining the meaning of a statute certainly falls within the responsibilities of this Court.

ARGUMENT

The Flood Control Act of 1928 provides, in part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. Justice Stevens has explained that this

> sentence has assumed greater and greater importance because it has provided the Government with a defense to claims for personal injury and death caused by federal negligence, gross negligence, and even "conscious governmental indifference to the safety of the public."

Hiersche v. United States, 503 U.S. 923, 924 (1992) (quoting *United States v. James*, 478 U.S. 597, 600 (1986)), *denying cert.* Unfortunately, the scope of Flood Control Act immunity differs depending upon which Circuit Court of Appeals a lawsuit is brought in.

Justice Stevens has also noted that

> [i]n some Circuits the Government's flood-control immunity would not constitute a defense in the case of injuries resulting from Government conduct that was unrelated to any flood-control purpose.

Id. at 925. In other circuits, however flood control immunity is a defense.

Legal scholars have studied circuit conflicts to determine which conflicts are so intolerable as to require resolution. Justice Stevens has cited these studies in support of his suggestion that the conflict at issue in this case is in fact tolerable and can better be resolved by Congress. *Hiersche*, 503 U.S. at 925 ("This Court has a duty to resolve conflicts among the courts of appeal. As several scholars have recognized, however, that duty is not absolute. Some conflicts are

tolerable. Others can be resolved more effectively by Congress.").

Contrary to Justice Stevens' view, however, a careful examination of the conflict involved here reveals that it is among those most deserving of review by this Court.

I

THE CONFLICT INVOLVED IN THIS CASE IS INTOLERABLE BECAUSE IT UNFAIRLY DENIES A REMEDY TO TORT VICTIMS IN SOME CIRCUITS WHILE ALLOWING REMEDIES IN OTHER CIRCUITS

In section 302 of the Judicial Improvements Act of 1990, Congress adopted a recommendation of the Federal Courts Study Committee and requested the Federal Judicial Center

> to conduct a study and submit to the Congress a report . . . on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.

Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 302, 104 Stat. 5089 (amended 1992). Congress specifically directed the Federal Judicial Center to consider "all relevant factors," including whether the conflict

> (1) imposes economic costs or other harm on persons engaging in interstate commerce;
>
> (2) encourages forum shopping among circuits;
>
> (3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
>
> (4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for

> different circuits, but is unlikely to be resolved by the Supreme Court.

Id. The purpose of the study, according to the legislative history of section 302, was "to determine objectively those conflicts that are 'intolerable' and yet, for whatever reason, are unlikely to be resolved by the Supreme Court." Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693, 798 (1995). The legislative history also makes clear that the sponsors of section 302 defined tolerability with reference to the four factors listed above. The study, conducted by Professor Arthur D. Hellman, considered each of those factors in an effort to determine, in part, which intercircuit conflicts are most intolerable.

After analysis, the list of truly significant factors was narrowed. For example, Professor Hellman concluded that "[t]he danger of 'encouraging nonacquiescence by Federal agencies' in decisions of the regional court of appeals can almost be ruled out as a factor that would make unresolved conflicts intolerable." Hellman, *By Precedent Unbound* at 772. This is so because the number of challenges to agency policies or practices of general applicability is small, and the number of cases that "posed a serious threat to uniformity in agency operations was minuscule." *Id.* Hellman also concluded that "[e]ncouragement of forum shopping is not a factor that requires independent consideration in analyzing the tolerability of unresolved conflicts." *Id.* This is because forum shopping is not an inherent evil. It is only evil when a change in applicable law between fora imposes different obligations or leads to different outcomes. Thus, concerns about forum shopping are subsumed in the factors addressing harm to multicircuit actors and unfairness to litigants in different circuits.

Ultimately, Professor Hellman concluded that

> the key to tolerability is effect on outcomes. Unless the choice between competing rules leads courts to reach divergent results in similar cases, none of the consequences that concerned the Study Committee are likely to materialize.

Id. at 785. A conflict is most intolerable where "the difference in circuit law is likely to produce different outcomes in later cases." *Id.* at 773.

The conflict involved in this case is intolerable because it unfairly denies a remedy to tort victims in some circuits while allowing remedies in other circuits. The Ninth Circuit "recognize[d] that had this case been instituted in the Fourth, Seventh or Tenth Circuit the government would probably not enjoy flood control immunity." *Central Green Co. v. United States*, 177 F.3d 834, 839 (9th Cir. 1999). Thus, plaintiffs who are injured, or whose property is damaged, because of government negligence can pursue recovery in these other circuits. Yet in the Ninth Circuit they are turned away.

Under the Ninth Circuit's interpretation, a court has subject matter jurisdiction over a tort claim against the government only if a plaintiff's injuries are "wholly unrelated" to flood control activities. *Central Green*, 177 F.3d at 839. If the accident had anything to do with a flood control project, or the management of a flood control project, then the plaintiffs cannot sue. *Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268, 271 (6th Cir. 1996). Even if the only connection between the plaintiff's injury and flood control is the mere fact that Congress authorized the expenditure of funds for flood control purposes, the government has immunity, even if the funds were not actually spent on flood control. *Central Green*, 177 F.3d at 839. With a rule this strict, it is not surprising that

> [t]he circuit courts with the toughest-sounding tests, like the Ninth Circuit, report no cases where the plaintiff's theory of liability did not involve a challenge to the government's flood control activities or the government's decisions about how to maintain flood control waters.

Cantrell v. United States Department of Army Corps of Engineers, 89 F.3d at 273. With a rule that sweeps as broadly as the Ninth Circuit's, nearly every injury will be somehow related to flood control. Consequently, every case is dismissed.

In contrast, in the Tenth Circuit flood control immunity "depends not on the character or origin of the water, but on the purpose of the project and the nature of the activity creating the nexus with the injury." *Williams v. United States*, 957 F.2d 742, 744 (10th Cir. 1992). The Seventh Circuit similarly requires a nexus between the injury and some activity that furthers the purposes of flood control.

> If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard to conceive that they are "damage from or by floods or flood waters" within the scope of Sec. 702c.

Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990). Consequently, the government could not benefit from immunity in such situations.

Plaintiffs in circuits like these can proceed with their lawsuits unless the government shows that some flood control activity is closely related to the injury. A mere connection to

a flood control project is not enough for immunity unless there is a nexus between the injury and some activity in furtherance of a flood control purpose. Consequently, in these other circuits, plaintiffs can recover even if their injuries are closely related to flood control projects. *See, e.g., Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268 (permitting a negligence claim to proceed even where accident arose on a lake used as flood control reservoir where the breach of duty of care was not undertaken to control flooding); *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989) (suit not barred where plaintiff alleges that government negligently allowed speedboats on the lake without first warning swimmers); *Cox v. United States*, 827 F. Supp. 378 (N.D.W. Va. 1992) (suit not barred where plaintiff alleges that Corps of Engineers negligently allowed children to use a dangerous rope swing near flood control lake). Plainly, the conflict among the circuits as to the meaning of "from or by floods or flood waters" leads to different outcomes in different parts of the country.

Professor Hellman has concluded that "[a] strong signal that a conflict leads to divergent outcomes is the rejection by a court in one circuit of another circuit's precedent." Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247, 260-61 (1998). Rejections of other circuit's precedents abound in the Flood Control Act cases. For example, in *Boyd v. United States*, the Tenth Circuit refused to follow the Ninth Circuit's "wholly unrelated" rule. 881 F.2d at 900. In *Morici Corp. v. United States*, the Ninth Circuit expressly rejected the rule followed in the Fourth Circuit. 681 F.2d 645, 647-48 (9th Cir. 1982). In *Dawson v. United States*, the Third Circuit refused to follow the Tenth Circuit, 894 F.2d 70, 73, (3d Cir. 1990). In *Cantrell v. United States Department of Army Corps of Engineers*, the Sixth Circuit rejected the rule followed in the Seventh. 89 F.3d at 274. These dueling standards lead to considerable uncertainty in the application of a federal law

that has not changed. The foremost consideration is, and should be, fairness.

> [T]he fact that a federal statute has been enacted, or a constitutional provision adopted, tells us that the American people have made a decision that a matter should be dealt with in the same way throughout the nation. That determination is also frustrated by differential enforcement of the rights and duties of citizens vis-a-vis one another, when those rights and duties derive from federal law.

Hellman, *By Precedent Unbound* at 757. Justice White reflected this view when he noted that denying review in a conflict case "underlines the fact that . . . citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari).

As a secondary matter, the existence of these competing rules imposes disparate costs and can lead to inconsistent federal policy. Professor Hellman has noted that

> [o]ne aspect of primary behavior that may be affected even when a conflict relates only to the availability of a damage remedy is insurance coverage. If one circuit imposes liability when another would not, multicircuit actors may feel obliged to buy more insurance, or they may be required to pay higher premiums for the coverage they have.

Hellman, *By Precedent Unbound* at 750. Similarly, farmers such as the Petitioner, who farm land near federally maintained irrigation projects, will likely pay more for flood insurance in the Ninth Circuit, where federal indemnity is not available, than in other circuits where the United States may face liability. Another consequence is that tort law cannot provide government agencies with an incentive to manage water projects with

reasonable care in circuits like the Ninth, as it would in other circuits where there is a threat of liability. Consequently, in some places, administrative agencies of the United States have less incentive to perform their duty to act reasonably in the maintenance of irrigation projects.

A conflict between the circuits is intolerable when it produces different outcomes. There can be no question that the Petitioner's suit would continue if Petitioner had been injured in a different circuit. The Ninth Circuit below admitted as much. Permitting such a disparity to continue not only leads to injustice, but also undermines the very notion of a national law. For these reasons, this Court should grant the petition and resolve this dispute.

II

THE CONFLICT IN THE CIRCUITS CAN BE RESOLVED NOW AND DOES NOT REQUIRE FURTHER PERCOLATION

Several other subtle but significant factors seem to inform this Court's decisions to grant or deny certiorari in cases involving intercircuit conflicts. Is the conflict likely to resolve itself, perhaps because the statute will be repealed or amended? Do the circuits that have addressed the issue appear to be heading toward consensus? Is the conflict current and persistent? Each of these factors, and several similar considerations, seem to involve the question of urgency. Why must this conflict be resolved now? Will there be a better time? Is there a better case for resolving the issue? Does the issue need more "percolation"?

Professor Hellman has explained that "percolation is not viewed as an end in itself, but as a means to an end. The premise is that when the issues have been thoroughly canvassed by courts on both sides of the issue, the conflict will be resolved." Hellman, *By Precedent Unbound* at 700. The time

has come for resolution of this conflict. There is no longer any reason to wait.

The issue is fully developed. Nearly every circuit court in the land has addressed the scope of governmental immunity under the Flood Control Act. *See, e.g., Dawson v. United States*, 894 F.2d 70, 74 (3d Cir. 1990) (following Ninth Circuit's "wholly unrelated" test as appropriate way to determine section 702c immunity); *Hayes v. United States*, 585 F.2d 701, 702-03 (4th Cir. 1978) (holding plaintiff may be able to avoid absolute bar of section 702c if his injury was result of operation of project as recreational facility without regard to its flood control aspects); *Mocklin v. Orleans Levee District*, 877 F.2d 427, 430 (5th Cir. 1989) (following the Ninth Circuit); *Cantrell v. United States Department of Army Corps of Engineers*, 89 F.3d 268, 274 (6th Cir. 1996) (recognizing immunity where there is a connection between federal flood control efforts and the alleged tortious conduct); *Bailey v. United States Department of the Army, Corps of Engineers*, 35 F.3d 1118, 1124 (7th Cir. 1994) (holding that immunity provision applies only if activities at project increased probability of injury to plaintiff); *Zavadil v. United States*, 908 F.2d 334 (8th Cir. 1990) (holding that section 702c immunity applied when governmental control of waters was a "substantial factor" in bringing about injuries); *McCarthy v. United States*, 850 F.2d 558, 562 (9th Cir. 1988) (holding that immunity provision applies unless injury is "wholly unrelated" to flood control); *Boyd v. United States ex rel. United States Army Corps of Engineers*, 881 F.2d 895, 900 (10th Cir. 1989) (holding that immunity provision does not attach when injury results from recreational use of flood control waters). As discussed in this brief, and in the Petitioner's brief, the disagreements between the different circuits are stark and clear. These courts have produced an abundance of opinions on the issue, explaining differences, and justifying holdings. The legal academy has also focused on this issue. *See, e.g.*, Sarah Juvan, Note, *The Federal Flood Control Act: Congressional*

Development of a Modern-Day Ark, 44 Drake L. Rev. 303 (1996); Mary Jean Pedersen, Note, *Boudreau v. United States: Government Immunity Under the Flood Control Act of 1928 and the Effect of Outdated Legislation on Society*, 41 Vill. L. Rev. 1487 (1996); Michael S. Levine, Note, *United States v. James: Expanding the Scope of Sovereign Immunity for Federal Flood Control Activities*, 37 Cath. U. L. Rev. 219 (1987). There is no question that there is a voluminous body of literature to inform the Court's analysis. Included in this mass is the collected wisdom of many federal judges. There is simply little left to say. Further "percolation" of this issue cannot benefit the Court.

The competing rules are relatively self-contained in operation. They are not entangled with procedural questions and do not leave much room for case-by-case evaluation. The question is simple—Was the plaintiff harmed "from or by floods or flood waters"? Each circuit court, regardless of the particular rule applied, asks only whether the injury is sufficiently related to flood control to warrant immunity. Unfortunately, the circuits find immunity at different points along the scale. But, the scope of Flood Control Act immunity is not so intertwined with other issues that one could conclude that the Court's resolution of this conflict would not, in fact, put it to rest.

This conflict is unlikely to be resolved without the aid of this Court. The circuit courts are not heading toward consensus. Even recent decisions reveal the conflict. *Compare Washington v. East Columbia Basin Irrigation District*, 105 F.3d 517, 519 (9th Cir.), *cert. denied*, 118 S. Ct. 364 (1997), *with Holt v. United States*, 46 F.3d 1000, 1004-05 (10th Cir. 1995), *and Boyd v. United States*, 881 F.2d at 899-900. The issue is not stale and the rules are not antiquated. The Federal Reporter and the Federal Supplement reveal a steady stream of cases addressing these issues, with a new decision almost every year. Moreover, Congress is unlikely to act. The

Flood Control Act has been on the books since 1928. The conflict presented here has existed for decades. Justice Stevens has even pointedly invited Congress to resolve the conflict through legislation. *Hiersche v. United States*, 503 U.S. 923, 925-26 (1992). Yet Congress has not acted. When Congress sits on its hands despite a pointed invitation by a Supreme Court Justice, despite decades of disparate treatment under the law, is it reasonable to expect legislation to be forthcoming?

The stakes are high. For plaintiffs like the Petitioner, Flood Control Act immunity guards the door to the courthouse. In some parts of the country, plaintiffs can get into court; in others they cannot. The rule involved here determines whether a remedy is even available. If the government gets immunity, the lawsuit is over, and the plaintiff, or its insurance company, suffers uncompensated losses.

Each of these factors suggest that urgency is required in the resolution of the question presented. Further "percolation" cannot help. Nearly every circuit court has addressed the issue. Thus, the Court can benefit from the judgment of many federal judges and other legal scholars. The conflict between the circuits is clear, the rules are self-contained, and the stakes are high. Since this conflict is unlikely to be resolved without the aid of this Court, the petition should be granted.

III

INTERPRETATION OF THE IMMUNITY PROVISION IS PROPERLY THE FUNCTION OF THIS COURT

In *Hiersche v. United States*, Justice Stevens' opinion "respecting the denial of the petition for writ of certiorari" argues that "Congress, not this Court, has the primary duty to confront the question whether any part of this harsh immunity doctrine should be retained." 503 U.S. at 926. Justice Stevens emphasizes that Flood Control Act immunity is "an anachronism," an "obsolete legislative remnant," an "engine of

injustice." *Id.* Part of the problem is that, when Congress enacted the law, it did not consider the alternative purposes for flood-control projects, such as power generation, recreation, and conservation, along with the impacts of those purposes. *Id.* Is it possible that the Court would invade the province of the legislative branch by granting the petition and resolving this conflict? No.

Congress' position on Flood Control Act immunity is known. Congress has deferred to the courts by doing nothing. Had the legislative branch determined Flood Control Act immunity to be inconsistent with the Federal Tort Claims Act, it could have expressly repealed the immunity provision when the Federal Tort Claims Act was enacted in 1948, as it did with several other statutes. But it did not. *See National Manufacturing Co. v. United States*, 210 F.2d 263, 274 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954). This issue was emphasized again in 1954, when the Eighth Circuit held that the Federal Tort Claims Act did not repeal Flood Control Act immunity by implication. *Id.* Congress did not respond. Justice Stevens drew attention to the many ambiguities in the provision when he dissented from this Court's decision in *United States v. James*. 478 U.S. 597, 612 (1986). Yet Congress preserved the status quo. Finally, Justice Stevens expressly called for congressional action in his opinion respecting the denial of certiorari in *Hiersche*. *Hiersche v. United States*, 503 U.S. at 926. But Congress has done nothing. It is useless for the Court to defer to Congress, in the hopes that Congress will resolve this conflict, when Congress has so clearly left the issue to the courts.

The statute exists. It affects real litigants on a regular basis. It is being applied by district courts and courts of appeals. In each case, the district courts and courts of appeals must interpret the law. Is it somehow more appropriate for the courts of appeals to interpret an existing law than it is for the highest court of the land? Even if the interpretation of this

provision would benefit from some congressional guidance, the court must make due with what it has. At this point, Flood Control Act immunity derives from an existing law, the various interpretations of which prejudice some litigants, and favor others, depending upon what part of the country they are injured in. The different interpretations arise out of a single phrase, "from or by floods or flood waters." The interpretation of pieces of text like this is standard fare for this Court. If Congress has not acted to clarify this law, despite an invitation to do so, it is not right that injustice should persist until it does.

Even if Flood Control Act immunity is an antiquated "engine of injustice," as Justice Stevens has claimed, it is printed in black and white in the U.S. Code. *Hiersche*, 503 U.S. at 926. It has current effects on real plaintiffs. Justice Department attorneys invoke it to avoid liability for the United States. It may be impossible to envision what Congress would have enacted had it considered "the power generation, recreational, and conservation purposes of flood-control projects" that became more important in the decades following the Act's enactment. *Id.* But this Court can determine what the sentence itself means. Doing so would not require any dalliance into the province of the legislative branch. In effect, Congress has decided that the immunity doctrine should be retained by failing to clarify, repeal, or amend it. If it must remain, we must know what it means.

CONCLUSION

Fairness and justice require that federal laws mean the same thing across the Nation. Yet governmental immunity under the Flood Control Act is a hodge-podge of different standards and varying outcomes. Different outcomes are the most important indicator that a conflict between the circuit courts is intolerable and must be resolved. In fact, this conflict is ready to be resolved. The issue has fully "percolated." The Court can benefit from the wisdom of many federal judges and

other legal scholars. Perhaps most importantly, no other body is likely to resolve this conflict. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2000.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

5/21/96	1	COMPLAINT before Senior Judge Robert E. Coyle referred to Magistrate Judge Sandra M. Snyder Summons issued; fee status paid; Receipt # 171910; jury demand; Notice regarding Consent forms (dg) [Entry date 05/22/96]
5/21/96	2	ORDER setting scheduling conference for 9:00 7/25/96 before Magistrate Judge Sandra M. Snyder (cc: all counsel) (dg) [Entry date 05/22/96]
6/27/96	3	RETURN OF SERVICE executed upon defendant -Madera Irrigation on 6/14/96 (fg) [Entry date 07/01/96]
6/27/96	4	RETURN OF SERVICE executed upon defendant USA on 6/14/96 (fg) [Entry date 07/01/96]
7/2/96	5	FIRST AMENDED COMPLAINT [1-1] by plaintiff; jury demand (lm) [Entry date 07/05/96]
7/2/96	6	PROOF OF SERVICE by plaintiff of [1-1] (lm) [Entry date 07/05/96]
7/2/96	7	PROOF OF SERVICE by plaintiff of [1-1] summons and complaint (lm) [Entry date 07/05/96]
7/11/96	8	LETTER for Central Green Company scheduling conference continued from

		7/25/96 to 10:00 9/26/96 (cc: all counsel)(fg) [Entry date 07/16/96]
7/16/96	9	ANSWER by - Madera Irrigation; jury demand (rm) [Entry date 07/18/96]
8/6/96	10	ANSWER by defendant USA to pltf's first amended complaint (fg) [Entry date 08/07/96]
9/19/96	11	SCHEDULING CONFERENCE STATEMENT by plaintiff (rm) [Entry date 09/20/96]
9/26/96	12	MINUTES of 9/26/96 before Magistrate Judge Sandra M. Snyder scheduling conference held on 9/26/96 order to follow (rm) [Entry date 09/27/96]
9/27/96	13	SCHEDULING ORDER Magistrate Judge Sandra M. Snyder expert disclosure ddl 8/15/97; supplemental expert disclosure ddl 9/12/97 ; discovery ddl 11/7/97 non-dispositive motion ddl 11/24/97 ;dispositive motion ddl 12/15/97; pretrial conf 2:00 2/3/98 #4; Jury Trial 10:00 3/24/98 #1; (cc: all counsel) (rm) [Entry date 09/30/96]
10/10/96	14	LETTER to court from counsel for plaintiff Central Green Co notifying the court that Timothy Jones is counsel (pp) [Entry date 10/11/96]
5/29/97	15	LETTER to court from counsel for plaintiff regarding discovery documents (lm) [Entry date 06/03/97]

7/18/97	16	MOTION for judgment on the pleadings for lack of subject matter jursdiction by deft USA before Judge Coyle Hearing Set For 8/18/97 1:30 ctrm 1; points and authorities (hl) [Entry date 07/21/97]
7/21/97	18	NOTICE: from H Nazaroff motion for judgment on the pleadings for lack of subject matter jursdiction by deft before Judge Coyle [16-1] HEARING SET FOR 1:30 8/25/97 (hl) [Entry date 08/15/97] [Edit date 08/15/97]
8/11/97	17	RESPONSE/memorandum of points and authorities by pltf Central Green Co in opposition to motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] (hl) [Entry date 08/12/97]
8/18/97	19	REPLY by deft USA to response in opposition to motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] (hl) [Entry date 08/19/97]
8/25/97	20	MINUTES of 8/25/97 before Senior Judge Coyle motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA [16-1] SUBMITTED C/R P Smith (hl)[Entry date 08/26/97]
9/18/97	21	ORDER by Senior Judge Robert E. Coyle ORDERING motion for judgment on the pleadings for lack of subject matter jursdiction by deft USA before

		Judge Coyle [16-1] GRANTED dismissing party USA for lack of subject matter jurisdiction (cc: all counsel) (jv) [Entry date 09/24/97)
9/24/97	--	LODGED substitution of attorneys by plaintiff Central Green Co (lh) [Entry date 09/25/97]
9/25/97	22	ORDER by Magistrate Judge Sandra M. Snyder ORDERING Timothy Jones to be substituted as attorney of record (cc: all counsel) (lh) [Entry date 09/26/97]
10/10/97	--	LODGED proposed order granting plaintiff's motion for entry of final judgment by plaintiff Central Green Co (lh) [Entry date 10/14/97]
10/10/97	23	NOTICE OF MOTION AND MOTION for entry of final judgment by plaintiff Central Green Co Motion Hearing Set for 11/17/97 at 1:30 pm (lh) [Entry date 10/14/97]
10/10/97	24	MEMORANDUM by plaintiff Central Green Co in support of motion for entry of final judgment (1h) [Entry date 10/14/97]
10/30/97	25	RESPONSE by defendant USA to motion for entry of final judgment by plaintiff Central Green Co [23-1] (cc) [Entry date 10/31/97]
11/10/97	26	MEMORANDUM by plaintiff Central Green Co in support of motion to certify

		order granting motion to dismiss and request for stay [23-1] (jv) [Entry date 11/13/97]
11/14/97	--	LODGED stipulation to have judgment entered and staying remaining issues pending appeal by plaintiff Central Green Co (ls) [Entry date 11/17/97]
11/17/97	27	MINUTES of 11/17/97 before Senior Judge Robert E. Coyle motion for entry of final judgment by plaintiff Central Green Co [23-1] GRANTED C/R C. Pickens (ls) [Entry date 11/18/97]
11/18/97	28	ORDER by Senior Judge Robert E. Coyle ORDERING party USA DISMISSED;, Case STAYED until the 9th Circuit rules on the Dismissal Order (cc: all counsel) (ls) [Entry date 11/19/97]
11/20/97	29	JUDGMENT; it is ordered that the United States is DISMISSED from this case (cc: all counsel) (ls)
12/3/97	30	NOTICE OF APPEAL by plaintiff Central Green Co from District Court decision, (fee status paid) (jv) [Entry date 12/04/97]
12/3/97	31	RECEIPT of $105/ Appeal Fee for pltf Central Green Co by Wilkins, Jones Drolshagen Receipt # 175683 (jv) [Entry date 12/04/97]

12/4/97	32	MAILED case information/docket fee payment notice copy of Notice of Appeal and appealed 11/20/97 judgment to 9th Circuit Court of Appeals copy of appeal and certified copy of docket sheet to all parties (jv)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CASE NO. CV-F-965541 REC SMS FIRST AMENDED COMPLAINT FOR DAMAGES FOR INVERSE CONDEMNATION; NUISANCE; TRESSPASS; AND NEGLIGENCE DEMAND FOR JURY TRIAL

Plaintiff CENTRAL GREEN COMPANY alleges as follows:

JURISIDICTION AND VENUE

1. CENTRAL is a Limited Partnership duly authorized and existing by virtue of the laws of the State of California and doing business in Madera County, California ("Plaintiff" or "CENTRAL").

2. Defendant the UNITED STATES of AMERICA is, and at all times mentioned herein was, a governmental organization authorized and existing by virtue of the laws of

the United States of America. The Department of the Interior of the United States of America operates the Bureau of Reclamation which, among other things, owns certain canals in Madera County used for delivery of irrigation water to farmers ("UNITED STATES")

3. Defendant the MADERA IRRIGATION DISTRICT ("DISTRICT") is, and at all times herein mentioned was, a public entity organized and existing under the laws of the State of California.

4. Venue is appropriate in this Court since all of the real property at issue in this action is located in Madera County, California and the torts alleged herein occurred in Madera County, California. Jurisdiction in this Court is based on 28 U.S.C. § 1346(b) as to the UNITED STATES and the pendant jurisdiction of this Court as to the DISTRICT

BACKGROUND ALLEGATIONS

5. At the time of Defendants' acts complained of herein, Plaintiff was the owner of the real property described in Exhibit "A" attached hereto and incorporated herein.

6. The real property described in Exhibit "A" consists of approximately 1000 acres. During the time that Plaintiff has owned this property, it has continually used it for the production of pistachios.

7. Plaintiff is informed and believes and thereon alleges that defendant UNITED STATES planned, designed, constructed, and/or maintains the Madera Canal which is used to convey irrigation water to various lands in the San Joaquin Valley and which runs through Plaintiff's property as shown in Exhibit "A".

8. Plaintiff is informed and believes and based thereon alleges that DISTRICT is under contract to the UNITED STATES whereby it has the right to use, and the obligation to maintain, the Madera Canal. A true and correct copy of the contract between the UNITED STATES and DISTRICT is attached hereto as Exhibit "B".

9. The Madera Canal was constructed or has been maintained in such a fashion that substantial amounts of water leak and have leaked from Defendants' canal causing substantial subsurface flooding of portions of Plaintiff's property. This subsurface flooding created an extremely shallow water table condition resulting in irreparable damage to portions of Plaintiff's pistachio orchard, as well as increased farming and harvesting costs.

10. Plaintiff has been told by Defendants that the water seepage/leakage problem would be taken care of and remedied. Based on these representations, Plaintiff has foregone legal action until the present time. Furthermore, Plaintiff is informed and believes and thereon alleges that no remedial work or efforts to thwart the leakage from the Madera Canal have been undertaken by Defendants.

11. On or about June 10, 1995 Plaintiff served its claim for damages in an amount in excess of $25,000 on Defendant DISTRICT in accordance with the law of the State of California and DISTRICT'S procedures. A true and correct copy of the claim served is attached hereto as Exhibit "C" and incorporated herein.

12. On or about June 29, 1995 Defendant DISTRICT rejected Plaintiff's claim. A true and correct copy of DISTRICT'S Notice of Rejection is attached hereto as Exhibit "D" and incorporated herein.

13. On or about July 27, 1995 Plaintiff served its claim for damages in an amount approximating $125,000.00 on the UNITED STATES through the Department of the Interior in accordance with the laws of the United States and Department of the Interior's procedures. A true and correct copy of the claim served is attached hereto as Exhibit "E".

14. On or about December 11, 1995 Defendant UNITED STATES through the Bureau of the Interior rejected Plaintiff's claim. A true and correct copy of the UNITED STATES' Notice of Rejection is attached hereto as Exhibit "F" and incorporated herein.

15. Plaintiff has received no compensation for the damage to its property.

FIRST CLAIM
(Inverse Condemnation - All Defendants)

16. Plaintiff incorporates by referenced each and every allegation contained in paragraphs 1 through 15 above as though fully set forth herein.

17. As a direct and necessary result of Defendants' negligent design, maintenance, and operation of the canal, Plaintiff's property was and is being flooded and severe property damage has been the result.

18. This damage was caused by Defendants' failure to design and/or maintain the canal so that it would not leak onto or under the land of adjacent property owners such as Plaintiff.

19. As a result of the flooding of its real property, Plaintiff has been damaged in an amount in excess of $125,000.00 including but not limited to damage for loss of trees on the property, decreased and lost production, replanting costs, increased farming and harvesting costs, and other damages to the property associated with the leakage.

20. In addition, Plaintiff has incurred and will continue to incur attorneys' fees, appraisal fees, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained but which are recoverable in this action under the provisions of Section 1036 of the California Code of Civil Procedure.

SECOND CLAIM
(Continuing Nuisance - All Defendants)

21. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 20 above as though fully set forth herein.

22. At all times mentioned herein, Defendants have operated and maintained its canal in a manner which has allowed water to leak from the canal and flood Plaintiff's property.

23. The aforementioned operation and maintenance of the canal by Defendants which allows water to leak onto Plaintiff's property constitutes a continuing nuisance within the meaning of California Civil Code Section 3479 in that it interferes with Plaintiff's use and enjoyment of the property.

24. Defendants, and each of them, have refused to abate the nuisance and will continue to refuse to do so unless restrained by this Court, will continue to maintain the nuisance and continue the acts complained of and each and every act has been and will be without the consent, against the will, and in violation of the rights of Plaintiff.

25. Unless Defendants are restrained by order of this Court, it will be necessary for Plaintiff to commence many successive actions against Defendants to seek compensation for damages sustained thus requiring a multiplicity of suits and Plaintiff will be threatened with flooding of its property each time the Madera Canal has water in it.

26. Unless Defendants are enjoined from continuing their course of conduct, Plaintiff will suffer irreparable injury as alleged above.

27. Plaintiff has no plain, speedy, or adequate remedy at law.

28. As a proximate result of the nuisance created by Defendants', Plaintiff has been, and will be, damaged in a sum in excess of $125,000.00 resulting from the loss of trees, reduced and lost production, replanting costs, lost business, increased farming and harvesting costs, diminution in value of Plaintiff's property and other repairs to put Plaintiff's property in the condition it was in prior to the damage caused by Defendants.

THIRD CLAIM
(Continuing Tresspass - All Defendants)

29. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 28 above as though fully set for the herein.

30. Defendants have at various time and continuing to the present, without Plaintiff's consent, caused water to be released from the Madera Canal and onto Plaintiff's land through their maintenance and operation of said canal. Said actions constitute a continuing trespass.

31. As a proximate result of the Madera Canal releasing water onto Plaintiff's property, Plaintiff's pistachio orchard was damaged to such an extent that Plaintiff suffered decreased production, the destruction of parts of the pistachio orchard thereby diminishing its value, replanting costs, increased farming and harvesting costs, and other repairs entitling Plaintiff to injunctive relief as alleged above and damages in a sum in excess of $125,000.00.

FOURTH CLAIM
(Dangerous Condition of Real Property - All Defendants)

32. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. Defendants, acting through their agents and employees, negligently and carelessly operated and maintained the Madera Canal so as to allow water to escape from the canal, causing subsurface flooding of Plaintiff's property. Such negligence caused a dangerous condition that created a substantial risk of the type of damage suffered by Plaintiff.

34. As a proximate result of the negligent conduct of Defendants and the dangerous conditions created thereby, water seeped onto Plaintiff's property causing subsurface and surface flooding, irreparable damage to Plaintiff's trees, diminution in value of Plaintiffs property, decreased production of Plaintiff's trees, replanting costs, increased farming and harvesting costs and other expenditures that Plaintiff has expended in an attempt to restore Plaintiff's property to the condition it was in prior to

the flooding. As a result of such injuries to Plaintiff's property, Plaintiff has and will suffer damages in a sum in excess of $125,000.00.

WHEREFORE, Plaintiff prays for judgment as follows:

On the First Claim

1. For damages in excess of $125,000.00 with interest thereon at the legal rate from the date of those damages;

2. For reasonable attorneys, appraisal, and engineering fees according to proof pursuant to C.C.P. Section 1036.

On the Second Claim

3. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

4. An injunction ordering Defendants to repair the Madera Canal and prevent the release of water onto Plaintiff's property.

On the Third Claim

5. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

6. An injunction ordering Defendants to repair the Madera Canal and prevent the release of water onto Plaintiff's property.

On the Fourth Claim

7. For general and specific damages in an amount in excess of $125,000.00 according to proof at trial and including but not limited to, the reasonable costs of replacing the trees destroyed, the loss of use of the affected parts of the orchard, production losses, increased farming and harvesting costs, diminution in value of Plaintiff's property, and other consequential damages arising from Plaintiff's attempts to restore the property to its prior condition.

On All Claims

8. For interest on all damages at the legal rate according to proof;

9. For reasonable attorneys' fees according to proof;

10. For all costs of suit reasonably incurred herein; and

11. For such other and further relief as the court may deem proper.

Dated: July 1, 1996

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES
Attorneys for CENTRAL GREEN COMPANY

DEMAND FOR JURY

CENTRAL GREEN COMPANY hereby demands a trial by jury on all issues triable thereby.

DATED: July 1, 1996

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES

EXHIBIT A

The real property which is the subject of this action is located in Madera County, California and more particularly described as: "that portion of parcel #5 described as Government Lot 8 and the S. ½ of Government Lots 9 and 10 in Sec. 6 T11S and R. 21E together with the S. ½ of the S. ½ of Sec. 1 T11S. R. 20E Recorded as Parcel #1 in Book 1206 Page 617 Madera County Records."

EXHIBIT "A"

EXHIBIT B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

COOPERATIVE AGREEMENT AMONG THE UNITED STATES OF AMERICA, THE MADERA IRRIGATION DISTRICT, AND THE CHOWCHILLA WATER DISTRICT PROVIDING FOR OPERATION AND MAINTENANCE OF MADERA CANAL AND ASSOCIATED PROJECT WORKS

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Central Valley Project, California

COOPERATIVE AGREEMENT AMONG THE UNITED STATES OF AMERICA,
THE MADERA IRRIGATION DISTRICT, AND THE CHOWCHILLA WATER DISTRICT
PROVIDING FOR OPERATION AND MAINTENANCE OF MADERA CANAL AND
ASSOCIATED PROJECT WORKS

THIS COOPERATIVE AGREEMENT made this 20th day of September 1985, pursuant to the Act of June 17, 1902 (32 Stat. 388), Section 5 of the Act of August 13, 1914 (38 Stat. 687), and acts amendatory thereof or supplementary thereto, all collectively hereinafter referred to as the Federal reclamation laws, among the UNITED STATES OF AMERICA, herein after referred to as the United States, the MADERA IRRIGATION DISTRICT, and the CHOWCHILLA WATER DISTRICT, hereinafter referred to as the Districts, public agencies of the State of California, duly organized, existing, and acting pursuant to the laws thereof, with their principal places of business in Madera and Chowchilla, California, respectively.

WITNESSETH THAT:

EXPLANATORY RECITALS

WHEREAS, the United States has constructed the Friant Division, Central Valley Project, including Friant Dam and Millerton Lake, Madera Canal, the Friant-Kern Canal, and operating headquarters for storage, diversion, carriage and distribution of the waters of the San Joaquin River for agricultural, municipal, industrial, domestic, and other purposes; and

WHEREAS, it is deemed to be in the best interest of the United States for the Districts to assume the care, operation, and maintenance of the Madera Canal; and

WHEREAS, the Districts, are willing to assume the care, operation, and maintenance of these works pursuant to the terms and conditions herein;

NOW THEREFORE, in consideration of the covenants herein contained, it is hereby mutually agreed as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed, or manifestly incompatible with the intent hereof, the term:

(a) "Secretary" or "Regional Grants and Cooperative Agreements Officer" hereinafter referred to as RGCAO shall mean the Secretary of the Interior or his duly authorized representative;

(b) "Project works" shall mean the Madera Canal, in-line control facilities, turnouts, measuring devices, Madera Canal Equalizing Reservoir, associated water level control devices and water level recording instruments, and other appurtenant structures as described in the Performance Work Statement (PWS) including related O&M documents, which is incorporated herein by reference;

(c) "Year" shall mean the period from and including the first day of October of each calendar year through the last day of September of the following calendar year;

(d) "Initial year" shall mean that year, or any part thereof, in which the Districts initially assume the care, operation, and maintenance of the Project works;

(e) "Quarter" shall mean each 3-month period beginning with the first day of October, January, April, or July; and

(f) "O&M" shall mean the care, operation, and maintenance of Project works.

TERM OF AGREEMENT

2. This agreement shall become effective on the date of execution and shall remain in effect until February 28, 1992, unless terminated as follows:

(a) Termination for cause.--The RGCAO may terminate this Agreement in whole, or in part, at any time before the date of completion, whenever it is determined that the Districts have failed to comply with the conditions specified herein. The RGCAO shall promptly notify the Districts in writing of the determination and the reasons for the termination, together with the effective date, which in no event will be less than 90 days from the date of notice. Payments made to the Districts or recoveries by the RGCAO should this Agreement be terminated for cause shall be in accord with the legal rights and liabilities of the parties.

(b) Termination for convenience. --The RGCAO or both Districts acting together may terminate this agreement in whole, or in part, when all parties agree that the continuation of the agreement would not produce beneficial results commensurate with the further expenditure of funds. The parties shall agree upon the termination conditions, including the effective date and, in the case of partial terminations, the portion to be terminated. The Districts shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. The RGCAO shall allow full credit to the Districts for the Federal share of the noncancellable obligations, properly incurred by the Districts prior to termination.

(c) Termination by one District.--If, at any time, one District desires to terminate their participation in this Agreement, said District shall provide 90 days written notice to both the RGCAO and the other District of such intent. Upon receipt of such notice, the RGCAO will determine if it is in the best interest of the United States for the remaining District to assume all of the obligations under this Agreement. If the RGCAO determines such assumption of obligations is in the

best interest of the United States, and said District wishes to assume said obligations, said District hereby agrees to said assumption. If the RGCAO determines such assumption is not in the best interest of the United States, or the remaining District opts not to assume the obligations of this Agreement, this Agreement will be terminated as provided in (b) above.

DISTRICT TO ASSUME RESPONSIBILITY FOR CARE, OPERATION, AND MAINTENANCE OF MADERA CANAL AND ASSOCIATED PROJECT WORKS

3. (a) Prior to the O&M of Project works by the Districts, the parties will conduct a joint inspection of the Project works. Subsequent to the inspection, the RGCAO will furnish the Districts a written notice, specifying the schedule on which O&M activities will be performed by the Districts, describing any deficiencies observed by either party during the joint inspection, and describing the actions to be taken to correct such deficiencies. The Districts will accept the responsibility for O&M of the Project works on October 1, 1985, and thereafter O&M said works in accordance with this Agreement and the PWS and attached OMB circulars A-102, as amended (Uniform Administrative Requirements for grants-in-aid to State and local Governments), A-128 (Implementing the Single Audit Act) and A-87, as amended (Cost Principles for State and local Governments).

(b) The Districts shall make no substantial change in the Project works without first obtaining the written consent of the RGCAO. The RGCAO's determination as to whether any change in any such works is or is not substantial shall be conclusive and binding upon the parties hereto. The Districts shall make promptly any and all repair to the Project works which, in the opinion of the RCCAO, are deemed necessary for the proper O&M of the same. In the event that the Districts neglect, fail, or are unable to make such repairs within a reasonable period of time, the United States may, upon giving

30 days' written notice to the Districts, cause the repairs to be made.

(c) The Districts shall O&M the Project works in the manner necessary to keep them in good condition and to satisfy all valid obligations of the United States pertaining to the diversion, carriage, and distribution of water in and from said works.

(d) The Districts shall O&M the Project works in accordance with the PWS and such documents shall be maintained in current status at a location designated by the Districts.

(e) All contracts or subagreements for construction or repair of Project works shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as implemented in Department of Labor Regulations (29CFR, Part 3).

TERMINATION OF AGREEMENT NO. 3-FC-20-00240

4. Madera Irrigation District hereby waives the 90-day termination notice for Agreement No. 3-FC-20-00240, entitled "Cooperative Agreement Between the United States of America and the Madera Irrigation District Providing for Operation of Madera Canal and Certain Additional Project Works." Said agreement will be terminated on September 30, 1985.

UNITED STATES TO BE HELD HARMLESS

5. The Districts hereby agree to indemnify and hold harmless the United States, its agents and employees, from any loss or damage and from any liability on account of personal injury, death, or property damage of any nature whatsoever and by whomsoever made arising out of the Districts' failure to properly perform their activities under this agreement. The Districts do not assume any liability to or agree to hold harmless the United States or any other person or persons for

damages or injuries caused by (1) faulty design or construction of the Project works, (2) faulty or insufficient maintenance or inspections prior to the transfer of said works to the District or (3) performance by the Districts of specific operations or procedures directed or approved by the RGCAO provided said operations or procedures are performed by the Districts in a customary or reasonable fashion.

DISTRICTS TO RELINQUISH RESPONSIBILITY FOR OPERATION AND MAINTENANCE OF THE MADERA CANAL AND ASSOCIATED PROJECT WORKS

6. The RGCAO shall at all times have access to the Project works and may inspect and investigate the same for the purpose of ascertaining if they are being kept in safe and proper operating condition. If at any time, the RGCAO determines that the Districts have not operated and maintained said works in accordance with the provisions of this Agreement, the RGCAO may, upon giving 90 days' written notice to the District suspend the Agreement and reassume the O&M of all or part of the Project works including all equipment owned by the United States which is then being used by the Districts to O&M the Project works, and equipment purchased by the Districts with funds obtained pursuant to this Agreement: Provided, That if in the opinion of the RGCAO, an emergency or other condition exists which would cause undue harm or damage to persons or property if not remedied immediately, such 90-day notice need not be given, and the Districts hereby agree to surrender O&M of the Project works, or any part thereof to the RGCAO, immediately upon notification of such emergency. Any taking back of responsibility for the O&M of said Project works by the United States shall not relieve the Districts of any of their obligations under this Agreement other than the obligation to O&M said works during the period the United States is doing so. The RGCAO may return the O&M responsibility of the Project works back to the District upon 90 days' written notice to the Districts.

SUBMITTAL OF PROPOSED BUDGETS

7. (a) Madera Irrigation District, no later than June 1 each year, shall submit on behalf of both Districts to the RGCAO, in such detail as he may require, a proposed program and budget, for the O&M of the Project works for the subsequent year and a preliminary budget for the two succeeding years. The budgets shall include all estimated O&M costs (normal maintenance, replacement, additions and extraordinary maintenance), administrative overhead, costs of liability insurance, participation in a self insurance or pooling agreement, including estimated retention of claims and legal expense, and other costs similar to those that would normally be incurred by the United States and which will be incurred by the Districts under this Agreement. Subject to the terms of this Agreement and provisions of Federal Acquisition Regulations (FAR), Subpart 31.6, all indirect and overhead costs charged against this agreement shall be apportioned in the same manner as the Districts apportion similar costs annually incurred in the Districts' operations, and as limited by Article 8.(a). The Madera Irrigation District shall notify the RGCAO as provided in Article 26 with respect to all estimated costs in excess of the estimated budget.

(b) The RGCAO shall, prior to July 1 each year, give written notice of approval of the budget for the succeeding year. If such written notice is not given by that date, the Agreement will terminate October 1 of that year.

(c) Notwithstanding the provisions of Part (a) of this article, the proposed program for O&M of the Project works may, with the written approval of the RGCAO, be revised during any year to meet unforseen contingencies. Provided, That in the event of an emergency, Madera Irrigation District may request and receive oral consent of the RGCAO for expenditure of funds to alleviate the emergency, which oral consent shall be confirmed in writing by the RGCAO within five working days. If the expenditure of funds for emergency purposes cause the total budget to be exceeded, Madera

Irrigation District shall submit on behalf of both Districts a revised budget within 30 days of the request for emergency expenditure authority for approval in accordance with Article 26.

INVOICES AND PAYMENTS (ALLOWABLE COSTS)

8. (a) For the purposes of this Article, the term "costs" shall include those recorded costs which result, at the time of the request for reimbursement, for necessary and reasonable direct and indirect costs incurred, but not necessarily paid, for the operation and maintenance of the Project under terms of this Agreement. Direct costs shall include labor and related fringe benefits, materials and supplies, travel, equipment depreciation, items or services purchased directly for operating and maintaining the Project works, and other related costs. Indirect costs charged to the Agreement shall be those normal and necessary administrative and general costs of operations that are equitably allocated to performing obligations under this Agreement. The allowability of all costs under this Agreement, including the basis for allocating indirect costs, shall be subject to cost allowability guidelines provided in FAR Subpart 31.6, and shall be subject to Bureau verification, as provided under Article 9, hereunder.

(b) For O&M of the Project works, the United States will pay to the Madera Irrigation District on behalf of both Districts, the allowable costs either through advance payments or by reimbursement of allowable costs incurred.

(1) Cash advances will be made in accordance with the requirements set forth in current Treasury and Departmental regulations and/or subsequent changes as they may occur. If the advance payments method is used, the amount of such payments will be the estimated costs as specified in the approved budget, less any balance of funds available from prior advances. Such payments shall not be made more frequently than monthly in amounts approved by

the RGCAO. The Districts shall submit to the RGCAO a statement of costs incurred during the month by the 25th of the following month. The Districts' monthly statement shall provide both monthly and fiscal year-to-date cost data.

(2) If the reimbursement method is used, Madera Irrigation District shall submit, on behalf of both Districts in such form and reasonable detail as the RGCAO may require, monthly invoices supported by a statement of costs for allowable costs incurred during the previous month. In recognition of the Districts' need for sufficient funds to meet cash flow requirements of the Operation and Maintenance activity, payment will be promptly processed after receipt of each invoice. The Districts will normally receive payment within 15 days after receipt of the invoices by the RGCAO.

(c) By October 31 of each year, Madera Irrigation District shall submit on behalf of both Districts a voucher for all allowable costs for the year which ended the preceding September 30 which were not previously paid. This final voucher for each year will be accompanied by a statement detailing the total incurred costs for the entire year which ended the preceding September 30. This statement will be in such format and provide such detail as the RGCAO requires.

(d) Any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by either District for activities performed under this Agreement shall be paid or credited by said District to the United States to the extent that they are properly allocable to costs for which the Districts have been reimbursed by the United States under this Agreement. Reasonable expenses incurred by the Districts for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the RGCAO. Prior to final payment under this Agreement, the Districts shall execute and deliver:

(1) An assignment to the United States, in form and substance satisfactory to the RGCAO, of future refunds, rebates, credits, or other amounts (including any interest

thereon) properly allocable to costs for which the Districts have been reimbursed by the Government under this Agreement; and

(2) A release discharging the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under operation and maintenance performed pursuant to this Agreement subject only to the following exceptions:

(a) Specified claims in stated amounts or in estimated amounts where the amounts cannot, at the time, be determined exactly by the Districts; and

(b) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Districts to third parties arising out of the performance of this Agreement. Provided, however, That such claims have not been received by the Districts by the date of the execution of the release; and provided further, that the Districts give notice of such claims in writing to the RGCAO not more than 6 years after the date of the release or the date of any notice to the Districts that the United States is prepared to make final payment, whichever is earlier.

(e) All funds advanced by the United States pursuant to Section (b)(1) of this article shall immediately be deposited by the Madera Irrigation District in a special account in a bank that is a member of the Federal Reserve System, or, if approved by RGCAO, in any fiduciary account in a manner provided by the laws of the State of California, and such account shall be maintained until all funds so advanced shall have been expended or returned to the United States. Interest credited on funds advanced shall be considered as advances by the United States.

BOOKS, RECORDS, AND REPORTS

9. The Districts shall establish and maintain accounts and other books and records pertaining to its financial transactions, O&M of the Project works, and to other matters relating to this Agreement as the RGCAO may require. Reports

shall be furnished to the RGCAO in such form as he may require within thirty (30) days after the end of the year. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and official records relating to matters covered by this Agreement.

TITLE TO REMAIN WITH THE UNITED STATES

10. Title to all Project works shall remain with the United States until otherwise provided by the Congress.

RIGHT OF FIRST REFUSAL BY FEDERAL EMPLOYEES

11. Within the first 6 months from the effective date of this Agreement, the Districts shall give Federal employees adversely affected or separated from employment by the United States, as a result of this Agreement, the right of first refusal for employment by the Districts in positions for which they are qualified, in conformance with the respective Districts' personnel policies in effect at that time.

AUTHORIZATION OF LAND USES ON REAL PROPERTY OF THE UNITED STATES

12. (a) For the purposes of the Agreement, the following terms are defined as follows:

(1) An "outgrant" is a term used to collectively identify all instruments such as easements, licenses, permits, leases, memorandum of understanding, etc., issued to third parties by the United States authorizing the use of lands under its jurisdiction.

(2) "Right of use" includes easements, leases, licenses and permits issued to allow the occupying, using or traversing of lands under the jurisdiction of the United States and issued under authority granted for that purpose (synonymous with outgrant).

(3) "Right of use fee" means the fair market value of the rights, privileges and interests granted by the United States for the use of the land as determined by a qualified appraiser using approved appraisal methods (43 CFR 429).

(b) In granting a third-party right of use of the canal rights of way, the United States shall exercise care to assure that:

(1) The request is compatible with O&M on the canal rights of way;

(2) The encroachment is held to the minimum area practical;

(3) There is no interference with water supply operations on the right of way; and

(4) The outgrants issued conveys no more interest in or privilege to use the land than is required.

(c) Third parties to outgrants shall be charged a right-of-use fee. All right of use fees collected for outgrants shall be deposited to the Reclamation Fund.

(d) When the Districts receive a request (application) from a third party for an outgrant it shall be handled in accordance with Section 5.7 of the PWS.

(e) When the Districts find it necessary to construct facilities on lands under the jurisdiction of the United States for O&M of the Project works, the Districts shall not construct such facilities unless and until:

(1) The Districts notify the RGCAO of its plans, setting forth in detail the location, manner and extent of the proposed use; and

(2) The RGCAO, upon finding the proposed use to be reasonable and consistent with this Agreement and in accordance with good engineering practices, shall issue, without cost to the Districts, an appropriately written outgrant for such use.

RULES, REGULATIONS, AND DETERMINATIONS

13. (a) The RGCAO shall have the right to make rules and regulations governing the O&M of Project Works consistent with the laws of the United States and to add to or to modify them as may be deemed proper. The Districts hereby agree to observe all such rules and regulations unless they are inconsistent with the express terms of this Agreement.

(b) Where the terms of this Agreement provide for action to be based upon the opinion or determination of any party to this Agreement, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

NOTICES

14. Any notice, demand, or request authorized or required by this Agreement shall be deemed to have been given, on behalf of the Districts, when mailed, postage prepaid, or delivered to the Regional Director, Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825, and on behalf of the United States, when mailed, postage prepaid, or delivered to the Madera Irrigation District, 12152 Road 28-1/4, Madera, California 93637. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

ASSIGNMENT LIMITED--SUCCESSORS AND ASSIGNS OBLIGATED

15. The provisions of this Agreement shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this Agreement or any part or interest therein shall be valid until approved by the RGCAO, and such approval shall not be unreasonably withheld.

EQUAL OPPORTUNITY

16. The following clause is applicable for any subcontract the Districts may enter into which is in excess of $10,000. During the performance of this Agreement, the Districts will include the following requirement in such subcontracts:

(a) The subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The subcontractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the RGCAO setting forth the provisions of this nondiscrimination clause.

(b) The subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the subcontractor, state that all qualified applicants will receive consideration for employment without discrimination because of race, color, religion, sex, or national origin.

(c) The subcontractor will send to each representative of workers, with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the RGCAO, advising the said workers' representative of the subcontractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The subcontractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The subcontractor will furnish all information and reports required by said amended Executive Order and by

the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the RGCAO and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the subcontractor's noncompliance with the nondiscrimination clauses of this subcontract or with any of the said rules, regulations, or orders, this subcontract may be canceled, terminated, or suspended, in whole or in part, and the subcontractor may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Districts will include the provisions of paragraphs (a) through (f) in every subagreement, subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of said amended Executive Order, so that such provisions will be binding upon each subcontractor or vendor. The Districts will take such action with respect to any subagreement, subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the Districts become involved in or is threatened with litigation, with a subcontractor or vendor as a result of such direction, the Districts may request the United States to enter into such litigation to protect the interests of the United States.

Note: Equal Employment Opportunity provisions are directed by Executive Order No. 11246 of September 24, 1965, (3 CFR page 167, 1965 Supplement), as amended by Executive Order No. 11375 or October 13, 1967, (3 CFR page 320, 1967 Compilation) and Executive Order No. 12086 of October 5, 1978.

TITLE VI, CIVIL RIGHTS ACT OF 1964

17. (a) The Districts agree that they will comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241) and all requirements imposed by or pursuant to the Department of the Interior Regulation 843 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Districts receive financial assistance from the United States and hereby gives assurance that it will immediately take any measures to effectuate this Agreement.

(b) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Districts by the United States, this assurance obligates the Districts, or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Districts for the period during which they retain ownership or possession of the property. In all other cases, this assurance obligates the Districts for the period during which the Federal financial assistance is extended to them by the United States.

(c) This assurance is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Districts by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Districts recognize and agree that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This

assurance is binding on the Districts, their successors, transferees, and assignees.

CERTIFICATION OF NONSEGREGATED FACILITIES

18. The Districts hereby certify that they do not maintain or provide for their employees any segregated facilities at any of their establishments, and that they do not permit their employees to perform their services at any location, under their control, where segregated facilities are maintained. They certify further that they will not maintain or provide for their employees any segregated facilities at any of their establishments, and that they will not permit their employees to perform their services at any location, under their control, where segregated facilities are maintained. The Districts agree that a breach of this certification is a violation of the Equal Opportunity clause in this Agreement. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, restrooms, and washrooms, restaurants and other eating areas, time clocks, locker rooms and other, storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, creed, color, or national origin, because of habit, local custom or otherwise. The Districts further agree that (except where they have obtained identical certifications from proposed subcontractors for specific time periods) they will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity clause; that they will retain such certifications in their files; and that (except where the proposed subcontractors have submitted identical certifications for specific time periods) the Districts will forward the following notice to such proposed subcontractors:

NOTICE TO PROSPECTIVE SUBCONTRACTORS OF REQUIREMENT FOR CERTIFICATIONS OF NONSEGREGATED FACILITIES

A Certification of Nonsegregated Facilities must be Submitted prior to the award of a subcontract exceeding $10,000 which is not exempt from the provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually). Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT -- OVERTIME COMPENSATION

19. The Districts shall include the following provisions in all subcontracts related to this Agreement that are in excess of $2,000 for construction contracts or in excess of $2,500 for other contracts involving the employment of mechanics or laborers:

(a) Overtime requirements. - No contractor or subcontractor contracting for any part of the work pursuant to this Agreement which may require or involve the employment of laborers, mechanics, apprentices, trainees, watchmen, and guards, shall require or permit any laborer, mechanic, apprentice, trainee, watchman, or guard in any workweek in which he is employed on such work to work in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek on work subject to the provisions of the Contract Work Hours and Safety Standards Act unless such laborer, mechanic, apprentice, trainee, watchman, or guard receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such workweek, whichever is the greater number of overtime hours.

(b) Violation; liability for unpaid wages; liquidated

damages. - In the event of any violation of the provisions of paragraph (a), the Districts and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such Districts and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer, mechanic, apprentice, trainee, watchman, or guard employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of 8 hours or in excess of his standard workweek of 40 hours without payment of the overtime wages required by paragraph (a).

(c) Withholding for unpaid wages and liquidated damages. - The RGCAO may withhold from the Districts, from any moneys payable on account of work performed by the Districts or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of the Districts or such subcontractor for unpaid wages and liquidated damages as provided in the provisions of paragraph (b).

(d) Subagreements or subcontracts. - The Districts shall insert paragraphs (a) through (d) of this clause in all subagreements or subcontracts, and shall require their inclusion in all subagreements or subcontracts of any tier.

(e) Records. - The Districts shall maintain payroll records containing the information specified in 29 CFR 516.2(a). Such records shall be preserved for 3 years after the termination of this Agreement.

OFFICIALS NOT TO BENEFIT

20. (a) No Member of or Delegate to Congress, Resident Commissioner, or official of the Districts shall benefit from this Agreement other than as a water user or landowner in the same manner as other water users or landowners.

CONTINGENT ON APPROPRIATION OR ALLOTMENT

OF FUNDS

21. The expenditure or advance of any money or the performance of any obligation of the United States under this Agreement shall be contingent upon appropriation or allotment of funds. No liability shall accrue to the United States in case funds are not appropriated or allotted.

CLEAN AIR AND WATER

22. The Districts shall include the following provisions in all subcontracts related to this Agreement that are in excess of $100,000, or if a facility to be used has been the subject of a conviction under the Clean Air Act [42 U.S.C. 1857c-8(c)(1)] or the Federal Water Pollution Control Act [33 U.S.C. 1319(c)] and is listed by EPA:

(a) The subcontractor agrees as follows:

(1) To comply with all the requirements of Section 114 of the Clean Air Act, as amended (42 U.S.C., 1857 et seq., as amended by Public Law 91-604) and Section 308 of the Federal Water Pollution Control Act (33 U.S.C., 1251 et seq., as amended by Public Law 92-500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in Section 114 and Section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the execution of this Agreement.

(2) That no portion of the work required by this Agreement will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date this Agreement was executed unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use their best efforts to comply with clean air standards and clean water standards at the facility where the Agreement work is being performed.

(4) To insert the substance of the provisions of

this article into any nonexempt subcontract, including this paragraph (a)(4).

(b) The terms used in this article have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91-604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92-500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive order 11738, an applicable implementation plan as described in Section 110(d) of the Clean Air Act [42 U.S.C. 1857c-5(d)], an approved implementation procedure or plan under Section 111(c) or Section 111(d), respectively, of the Air Act [42 U.S.C. 1857c-6(c) or (d)] , or an approved implementation procedure under Section 112(d) of the Air Act [42 U.S.C. 1857c-7(d)].

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by Section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by Section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "comply" means compliance with clean air or water standards. Comply shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by the Districts or their subcontractor, to be utilized in the performance of this Agreement. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

23. DELETED

UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL BUSINESS DISADVANTAGED CONCERNS

24. It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in performing grants and cooperative agreements awarded by any Federal agency.

The Districts hereby agree to carry out this policy in the awarding of subagreements and contracts to the fullest extent consistent with efficient grant/cooperative agreement performance. The Districts further agree to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the recipient's compliance with this clause.

As used in this agreement the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern:

(a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(b) Whose management and daily business operations are controlled by one or more of such individuals.

The Districts shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

The Districts acting in good faith may rely on written representation by their agents or contractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

EXAMINATION OF RECORDS

25. (a) (1) The Districts agree to maintain books, records, documents, and other evidence pertaining to the costs and expenses of this Agreement (hereinafter collectively called "records") to the extent and in such detail as will properly reflect all net costs, direct and indirect, or labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which reimbursement is claimed under the provisions of this Agreement.

(2) The Districts agree to make available at its office(s) at all reasonable times during the period set forth in subparagraph (4) below any of the records for inspection, audit, or reproduction by any authorized representative of the Comptroller General and RGCAO.

(3) In the event the Comptroller General or any of his duly authorized representatives determine that his audit

of the amounts reimbursed under this agreement as transportation charges will be made at a place other than the offices of the Districts, the Districts agree to deliver, with the reimbursement voucher covering such charges or as may be otherwise specified within 2 years after reimbursement of charges covered by any such voucher, to such representative as may be designed for that purpose through the RGCAO, such documentary evidence in support of transportation costs as may be required by the Comptroller General or any of his duly authorized representatives.

(4) Except for documentary evidence delivered to the United States pursuant to subparagraph (3) above, the Districts shall preserve and make available its records (i) until expiration of 3 years after final payment under this Agreement or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulations (48 CFR Subpart 4.7), whichever expires earlier, and (ii) for such longer period, if any, as is required by applicable statutes, by any other clause of this Agreement, or by (a) or (b)below:

(a) If this Agreement is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of 3 years from the date of any resulting settlement.

(b)Records which relate to (i) litigation or the settlement of claims arising out of the performance of this Agreement, or (ii) costs and expenses of this agreement as to which exception has been taken by the Comptroller General or the RGCAO, or any of their duly authorized representatives, shall be retained by the Districts until such appeals, litigation, claims, or exceptions have been disposed of.

(5) Except for documentary evidence delivered pursuant to subparagraph (3) above, and the records described in subparagraph (4)(b) above, the Districts may in fulfillment of their obligation to retain their records as required by this clause substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of 2 years following the last day of the month of reimbursement to

the Districts of the invoice or voucher to which such records relate, unless a shorter period is authorized by the RGCAO with the concurrence of the Comptroller General or his duly authorized representative.

(6) The provisions of this paragraph (a), including this subparagraph (6), shall be applicable to and included in each subcontract hereunder which is on a cost, cost-plus-a-fixed-fee, time-and-material, or labor-hours basis.

(b) The Districts further agree to include in each of their subagreements or subcontracts, hereunder, other than those set forth in subparagraph (a)(6) above, a provision to the effect that the subcontractor agrees that the Comptroller General and the RGCAO, or any of their duly authorized representatives, shall, until the expiration of 3 years after final payment under the subagreement or subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records, of such subcontractor, involving transactions related to the subcontractor. The terms "subagreement or subcontract," as used in this paragraph (b) only, exclude (i) purchase orders not exceeding $10,000 and (ii) subagreements or subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

LIMITATION OF COST

26. (a) It is estimated that the total cost to the United States for the performance of this Agreement for October 1, 1985 through September 30, 1986 is $298,091.00, and the Districts agree to use their best efforts to perform the work specified in the Agreement and all obligations under this Agreement within such estimated cost. If, at any time, the Districts have reason to believe that the costs which they expect to incur in the performance of this Agreement in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost, or if, at any time, the Districts have reason to believe that the total cost

to the United States for the performance of this Agreement, exclusive of any fee, will be greater or substantially less than the then estimated cost, Madera Irrigation District shall notify the RGCAO in writing to that effect, giving the revised estimate of such total cost for the performance of this Agreement.

(b) The following are estimates of budget amounts for years two (2) through seven (7) of this Agreement. These estimates are not binding on either of the parties and are for informational purposes only:

Federal Fiscal Year	Amount
1987	$ 312,996
1988	$ 328,646
1989	$ 345,078
1990	$ 362,332
1991	$ 380,449
1992	$ 399,471

(c) Except as required by other provisions of this Agreement specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Districts for costs incurred in excess of the estimated cost set forth in the annual O&M budget and the Districts shall not be obligated to continue performance under the Agreement or otherwise to incur costs in excess of the estimated cost set forth in the annual O&M budget, unless and until the RGCAO shall have notified the Districts in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this Agreement. No notice, communication, or representation in any other form or from any person other than the RGCAO shall effect the estimated cost of this Agreement. In the absence of the specified notice, the United States shall not be obligated to reimburse the Districts for any costs in excess of the estimated cost set forth in the budget. When and to the extent that the

estimated cost set forth in the budget has been increased, any costs incurred by the Districts in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs has been incurred after the increase.

INSPECTION

27. The United States, through any authorized representative, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any such inspection or evaluation is made on the premises of the Project works, the Districts shall provide all reasonable facilities and assistance for the safety and convenience of the United States' representatives in the performance of these duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the Districts' activities under this Agreement.

RECLAMATION REFORM ACT

28. This agreement does not constitute a contract or an amendment to a contract with the United States as described in Section 203 (a)(2) of the Reclamation Reform Act of 1982 or the implementing rules and regulations.

IN WITNESS WHEREOF, the parties have executed this Agreement, on the date first above written.

THE UNITED STATES OF AMERICA

By_____/s/_____
Regional Grants and Cooperative
Agreements Officer
Bureau of Reclamation

MADERA IRRIGATION DISTRICT

(SEAL)

By_____/s/_____
President

Attest:

_____/s/_____
Secretary

CHOWCHILLA WATER DISTRICT

By_____/s/_____
President

Attest:

_____
Secretary

EXHIBIT C

Claim Form

COPY

(A claim shall be presented by the claimant or by a person acting on his behalf.)

NAME OF DISTRICT: Madera Irrigation District, 12152 Rd. 28 1/4, Madera, CA 93637

Name, address, mailing address if different, and phone number.

Name: Central Green Company, c/o Larry Freels

Address(es): 15737 Rd. 204, Madera, CA 93638

Phone Number: (209) 822-2800

2 List name, address and phone number of any witnesses.

Name:	Larry Freels; Cory Goin	Bob Stanfield-Mgr. MID	Bureau of Reclamation
Address:	Central Green (see above)	1252 Rd. 28 1/4	William H. Luce, Jr.
Phone Number:	Same as above	Madera, CA 93638	2666 N. Grove Ind. , Fresno 93727

3 List the date, time, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

Date: Now Time: Now Place: Central Green River Ranch, at Road 204 & the San Joaquin River - Madera County

Tell What Happened (give complete information): The Madera Canal runs through the center of my pistachio ranch. The water is and has been leaking from the canal. The flooding has killed trees and makes farming and harvesting expensive and difficult. Approx. 30 acres of mature pistachio trees are affected.

NOTE: Attach any photographs you may have regarding this claim.

4 Give a general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

Known damages include 1) loss of past production in trees; 2) death of trees; 3) additional farming costs; and 4) loss of future production.

5 Give the name or names of the public employee or employees causing the injury, damage, or loss, if known.

Contact person at MID: Bob Stanfield, Manager

6 If the actual amount of your claim is less than $10,000 indicate the exact amount of your claim, and if possible show specific itemization and/or include copies of any documents in support thereof. If the amount of the claim exceeds $10,000, no dollar amount should be included in this claim form. However, it is necessary to indicate whether jurisdiction will rest in Municipal or Superior Court. (Jurisdiction for any claim under $25,000 would rest in Municipal Court, and any claim over $25,000 would rest in Superior Court.)

Jurisdiction will rest in Superior Court as Central Green's damages are far in excess of $25,000.00. (Jurisdiction may also be proper in Federal Court.)

Date: 6/10/95 Time: 2:00 p.m. Signature:

000050

ANSWER ALL QUESTIONS. OMITTING INFORMATION COULD MAKE YOUR CLAIM LEGALLY INSUFFICIENT!

White - JPIA Office Copy / Yellow - District Office Copy / Pink - Claimant Copy

CLM-CF 042591

49

BEST AVAILABLE COPY

EXHIBIT D

MADERA
IRRIGATION
DISTRICT

12152 ROAD 28¼
MADERA, CA 93637
(209) 673-3514
(209) 268-2483
FAX (209) 673-0564

June 29, 1995

Central Green Company
15737 Road 204
Madera, CA. 93638

BOARD OF DIRECTORS

H. ROCKY TERANISHI
President

DONALD A.SIMI
Vice President

JOHNNY DENIZ
RONALD H. PISTORESI
FRED L. VALENZUELA,JR.
ROBERT L. STANFIELD
General Manager-Chief Engineer
CYNTHIA A. RASCOE
Secretary
FRANKLIN B.SECARA
Treasurer
CHARLES J. KETTER
Controller - Assessor - Collector
DENSLOW GREEN
Legal Counsel

Dear Mr. Freels:

NOTICE IS HEREBY given that the claim which you presented to the Madera Irrigation District on June 10, 1995 was rejected on its Merits.

WARNING

Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a State Court Action on this claim. See Government Code Section 945.6. Your time for filing an action in federal court may be less than this six months. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately.

In providing this notice, or by any other action it has taken on this claim, the Madera Irrigation District does not intend to relinquish or waive any of your legal claims requirements or any rights or defenses potentially available to Madera Irrigation District or its officers, employees or agents.

Should you file a lawsuit in this matter which is determined to be in bad faith and without reasonable cause, please be advised that Madera Irrigation District will attempt to recover all of its defense costs from you as allowed by California Code of Civil Procedure aracles 128.5 and 1038.

If you have any questions about your claim, or this letter, please call the undersigned at 209-673-3514.

Yours very truly,
/s/
Charles J. Ketter
Controller-Assessor-Collector
Enclosure

EXHIBIT E

BEST AVAILABLE COPY

Sept. II

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO. 1105-0008
EXPIRES 4-30-88

Submit To Appropriate Federal Agency:
Bureau of Reclamation
Attn: Rik Arndt
2666 N. Grove Industrial Dr. #106
Fresno, California 93727-1551

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*
Central Green Company - River Ranch
15737 Road 204
Madera, CA 93638
c/o Larry Freels

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
			See Attachment "A"	

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*

Central Green River Ranch is a large pistachio ranch. The Madera Canal runs through the property. The canal is and has been leaking, causing severe flooding to parts of the orchard. Trees have been killed, production lost and farming costs increased. William Luce, of the Bureau is aware of the problems as Bureau representatives have been to the property and have promised that remedial action will be taken.

PROPERTY DAMAGE

9. NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

10. BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)* Central Green's River Ranch - Rd. 204 and San Joaquin River - Pistachio Ranch; Mature pistachio trees have been killed; Have experienced loss of past & future production; Flooding to property; Approx. 30 acres of mature pistachio trees are affected.

PERSONAL INJURY/WRONGFUL DEATH

11. STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Larry Freels	Central Green Co. - See Above.
Cory Goins	Central Green Co. - See Above.
William Luce, Jr.	Bureau of Reclamation
Bob Stanfield	Madera Irrig. Dist., 12152 Rd. 28 1/4, Madera, CA 93637

12. *(See instructions on reverse)* **AMOUNT OF CLAIM *(in dollars)***

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
$125,000.00			$125,000.00

13. CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
	(209) 822-2800	7/27/95

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both *(See 18 U.S.C. 287, 1001.)*

000054

95-107
NSN 7540-00-634-4046
PREVIOUS EDITIONS NOT USABLE
STANDARD FORM 95 (Rev. 2-86)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

Attachment "A"
To
Claim For Damage, Injury, Or Death

6. Date and Day of Accident.

The canal continues to leak as of the date of this claim. The date the canal first began to leak is presently unknown.

EXHIBIT F

United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region
2800 Cottage Way
Room E-2753
Sacramento, California 95825-1890

IN REPLY REFER TO

LBR.PS.0402
T-S-168

Certified Mail--Return Receipt Requested

Central Green Company
River Ranch
Attn: Larry Freels
15737 Road 204
Madera, CA 93638

Claimant: (same)
Date of Claim: 7/27/95
Date of Incident: 1995
Place of Incident: Near Mile 2.9
Madera Canal, Central Valley Project

Dear Mr. Freels:

You have filed a claim in the amount of $125,000.00, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, which provides for settlement of claims for damages caused by the negligent act of omission of a government employee while acting within the scope of his/her employment under certain specified circumstances. This claim has been referred to this office for consideration.

The administrative record fails to disclose any factual or legal basis to support a finding that the United States is responsible for the injury or damage claimed by you. Consequently, this claim must be and is hereby denied.

If you are dissatisfied with this finding, you are entitled to resubmit this claim, together with your reasons for resubmission, to the Regional Solicitor, Pacific Southwest Region, Attn: Frank Wilson, 2800 Cottage Way, Room E-2753, Sacramento, California 95825, within six months from the date of the mailing of this decision, or you may file an action in the United States District Court within six months from the date of the mailing of this decision.

Sincerely,

/s/

David Nawi
Regional Solicitor

CHARLES J. STEVENS
United States Attorney
DANIEL E. BENSING
Assistant United States Attorney
Eastern District of California
3654 Federal Building
1130 0 Street
Fresno, California 93721
Telephone: (209) 498-7272

Attorneys for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN CO.,	CV-F-96-5541-REC-SMS
Plaintiffs,	
v.	ANSWER OF UNITED STATES TO Plaintiff's FIRST AMENDED COMPLAINT
UNITED STATES OF AMERICA, MADERA IRRIGATION DISTRICT,	
Defendants.	

Defendant, in answer to plaintiffs' complaint, hereby answer and assert affirmative defenses as follows:

ANSWER

1. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 1.

2. The allegations set forth in the first sentence of paragraph 2 are admitted. In response to the allegations set forth in the second sentence of paragraph 2, the United States admits only that the Bureau of Reclamation is an agency within the Department of the Interior of the United States and that the Bureau of Reclamation, among other things, owns certain canals in Madera County, California.

3. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 3.

4. The first sentence of paragraph 4 is a statement of venue and, as such, is a legal conclusion to which no response is required. The second sentence of paragraph 4 is a statement of jurisdiction and, as such, is a legal conclusion to which no response is required.

5. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 5.

6. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the paragraph 6.

7. In response to the allegations set forth in paragraph 7, the United States admits only that the United States planned, designed, and constructed the Madera Canal which is used, among other things, to convey water to various lands in the San Joaquin Valley.

8. The United States admits the allegations set forth in paragraph 8.

9. The United States denies the allegations set forth in paragraph 9.

10. The United States denies the allegations set forth in the first and third sentences of paragraph 10. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in the second sentence of paragraph 10.

11. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 11.

12. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 12.

13. In response to the allegations set forth in the first sentence of paragraph 13, the United States admits only that on August 16, 1995, the Bureau of Reclamation received a claim for damages in the amount of $125,000.00 from "Central Green Company - River Ranch." The United States denies the allegations set forth in the second sentence of paragraph 13.

14. In response to the allegations set forth in paragraph 14, the United States admits only that on December 11, 1995, the United States, through the Department of the Interior, denied the claim of "Central Green Company - River Ranch" described in the previous paragraph and that Plaintiff's Exhibit F is a true and correct copy of that denial.

15. The United States lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations set forth in paragraph 15.

16. In response to the allegations of paragraph 16, the United States incorporates by reference its responses to paragraphs 1 through 15 above.

17. The United States denies the allegations set forth in paragraph 17.

18. The United States denies the allegations set forth in paragraph 18.

19. The United States denies the allegations set forth in paragraph 19.

20. The United States denies the allegations set forth in paragraph 20.

21. In response to the allegations of paragraph 21, the United States incorporates by reference its responses to paragraphs 1 through 20 above.

22. The United States denies the allegations set forth in paragraph 22.

23. The United States denies the allegations set forth in paragraph 23.

24. The United States denies the allegations set forth in paragraph 24.

25. The United States denies the allegations set forth in paragraph 25.

26. The United States denies the allegations set forth in paragraph 26.

27. The United States denies the allegations set forth in paragraph 27.

28. The United States denies the allegations set forth in paragraph 28.

29. In response to the allegations of paragraph 29, the United States incorporates by reference its responses to paragraphs 1 through 28 above.

30. The United States denies the allegations set forth in paragraph 30.

31. The United States denies the allegations set forth in paragraph 31.

32. In response to the allegations of paragraph 32, the United States incorporates by reference its responses to paragraphs 1 through 31 above.

33. The United States denies the allegations set forth in paragraph 33.

34. The United States denies the allegations set forth in paragraph 34.

Defendant denies that Plaintiffs are entitled to any of the relief requested. Defendants hereby deny each and every allegation not previously admitted.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's second, third, and fourth claims because pursuant to 33 U.S.C. § 702c, the United States has not waived its sovereign immunity in cases involving flood control projects where damage is caused by flood waters, as was the case here.

THIRD AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's second, third, and fourth claims because pursuant to 28 U.S.C. § 2680(a), the United States has not waived its sovereign immunity in cases where the alleged act or omission of an employee of the United States is a discretionary function, as was the case here.

FOURTH AFFIRMATIVE DEFENSE

This Court has no jurisdiction to hear Plaintiff's first claim because pursuant to 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to hear cases arising under the Fifth Amendment of the United States Constitution where the requested relief is greater than $10,000.

FIFTH AFFIRMATIVE DEFENSE

To the extent that plaintiff is requesting relief for past damages, pursuant to 28 U.S.C. § 2401(b), this Court lacks jurisdiction to adjudicate damages occurring more than two years prior to the submission of Plaintiff's administrative claim.

The United States therefore respectfully requests that this Court issue an order

1. Dismissing the complaint with prejudice;
2. Assessing the costs of this litigation against plaintiffs; and
3. Granting such other relief as the court may deem just and proper.

Respectfully submitted,

Dated: 8- 6-96

CHARLES J. STEVENS
United States Attorney

By: /s/
DANIEL E. BENSING
Assistant U.S. Attorney

TIMOTHY JONES, #119841

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15737 Road 204
Madera CA 93638
Telephone: (209) 822-2800

Attorneys for: CENTRAL GREEN COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CASE NO. CV-F-965541 REC SMS REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS TO THE UNITED STATES OF AMERICA

PROPOUNDING PARTY: Plaintiff, CENTRAL GREEN COMPANY

RESPONDING PARTY: Defendant, THE UNITED STATES OF AMERICA

SET NO.: ONE (1)

Plaintiff CENTRAL GREEN COMPANY requests that Defendant UNITED STATES OF AMERICA ("UNITED STATES") produce the following documents within thirty (30) days pursuant to the Federal Rules of Civil Procedure 34.

The UNITED STATES is hereby requested to provide all information and produce all documents within the knowledge, possession, custody, or control of its agents, employees, attorneys, investigators, or any agents of the foregoing, or any other person who has made this information known or available to it, or from whom it can obtain this information.

This request for document production shall be continuing and supplemental responses hereto shall be required immediately if the UNITED STATES obtains further or different information from the time the responses hereto are made until the time of trial.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions are to be considered applicable with respect to each demand for production of documents contained herein.

A. Definitions.

1. "CENTRAL GREEN" shall refer to the Plaintiff, CENTRAL GREEN COMPANY, and its attorney, representatives and agents.

2. "UNITED STATES" shall mean and refer to Defendant, the Department of the Interior of the United States of America, Bureau of Reclamation, and its officers, directors, employees, attorneys, accountants, realtors, consultants, agents, representatives, persons engaged by it or its attorneys as an expert witness in any litigation or arbitration, and anyone else who has acted for or on its behalf.

3. "DISTRICT" shall refer to Defendant, MADERA IRRIGATION DISTRICT and its attorneys, representatives, employees and agents.

4. "MADERA CANAL" shall refer to the canal which gives rise to the subject litigation.

4. The terms "YOU" or "YOUR" shall refer to

Defendant UNITED STATES OF AMERICA and any counsel, consultants, experts, investigators, employees, agents or other persons acting on its behalf with the exception of its attorneys of record herein.

5. "WRITING" shall be understood to apply to any record or communication, including records of any telephonic communications, that would be a "writing," "recording" or "photograph" as provided by the Federal Rule of Evidence 1001, and shall include, without limitation, originals, duplications or copies (with or without notes or changes thereon), drafts, working papers, routing slips, and similar materials as well as machine readable data stored on cards, disks, magnetic tapes or other storage media.

6. The terms "DOCUMENT" or "DOCUMENTS" as used herein shall mean the original and all non-identical copies, duplicates, and reproductions on any medium from which intelligence or information can be retrieved. The term shall include, without limitation, any and all of the following:

> Letters, books, reports, summaries, studies, statements, speeches, notebooks, invoices, schedules, financial books and records, checks, telegrams, telexes, recordings on computer disk or tape or other data processing storage devices, telecopier transmittals, applications, agreements, appointment calendars, working papers, graphs, manuals, brochures, contracts, memoranda, notes, records, correspondence, diaries, bookkeeping entries, and any published materials, and matter that concerns, reflects, embodies or relates to oral communications.

The term shall include, without limitation, each and every copy, duplicate, reproduction, prior draft, excerpt, note, summary, or any matter prepared from any of the foregoing which differs from the original due to corrections, alterations, notations, deletions, marginalia, confirmation, routing instructions or records, or otherwise.

B. Instructions.

1. Original Form. CENTRAL GREEN requests that all documents be produced in the form in which they are found in their normal filing place, including the document file folder or other bindings in which they are regularly maintained.

2. Documents Not Produced.

Whenever a document is not produced in full, please state with particularity the reason it is not being produced in full, and describe, to the best of your knowledge, information and belief and with as much particularity as possible, those portions of the document which were not produced.

3. Privilege Log. As to any document that is requested for which a privilege or other protection from disclosure is asserted, specify the specific ground for each privilege or protection claimed and identify the document with particularity, including the date, author, subject matter, recipients thereof, and number of pages.

4. Construction of Conjunctives. The conjunctives "and" and "or" as used herein shall be construed both conjunctively and disjunctively, and each shall include the other wherever such dual construction will serve to bring within the scope of this request any documents which would otherwise not be brought within its scope.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1:

Each and every document and/or writing, including plans, drawings, specifications and/or maps which relate to the design and construction of the MADERA CANAL.

REQUEST NO. 2:

Each and every document and/or writing which relate in any manner to the as-built plans of the MADERA CANAL.

REQUEST NO. 3:

Each and every document and/or writing which relate in any manner to any and all leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 4:

Each and every document and/or writing which in any manner relate to any testing performed with respect to leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 5:

Each and every document and/or writing which in any manner relate to any repairs made at any location along the MADERA CANAL with respect to leaks and/or water seepage from the MADERA CANAL.

REQUEST NO. 6:

Each and every document and/or writing which support, evidence or establish any agreements between defendants UNITED STATES and the DISTRICT relative to the MADERA CANAL.

REQUEST NO. 7:

Each and every document and/or writing which relate in any manner to the maintenance of the MADERA CANAL.

REQUEST NO. 8:

Each and every document and/or writing which relate in any manner to the operation of the MADERA CANAL.

REQUEST NO. 9:

Each and every document and/or writing contained in YOUR entire file which relate in any manner to CENTRAL GREEN.

REQUEST NO. 10:

Each and every document and/or writing contained in YOUR entire file which relate in any manner to the DISTRICT.

REQUEST NO. 11:

All correspondence between the UNITED STATES and anyone regarding leaks and/or seepage of water from the MADERA CANAL onto or under CENTRAL GREEN or its predecessor in interest's real property.

DATED: September 12, 1996

McCORMICK, BARSTOW, SHEPPARD
WAYTE & CARRUTH LLP

By: /s/
TIMOTHY JONES

TIMOTHY JONES, #119841

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP
Post Office Box 28912
5 River Park Place East
Fresno, California 93729-8912
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W. ALLEN BENNETT, #171963
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Madera CA 93638
Telephone: (209) 822-2800

Attorneys for: CENTRAL GREEN COMPANY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership,	)	CASE NO. CV-F-965541 REC SMS
	)	SCHEDULING CONFERENCE STATEMENT
Plaiutiff,	)	
vs.	)	DATE: September 26, 1996
	)	TIME: 10:00 a.m.
	)	CTRM: 4
UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT,	)	Trial Date: None
Defendants.	)	

I

PARTIES AND PLEADINGS

1. Plaintiff CENTRAL GREEN COMPANY is a limited partnership which owns certain real property located in Madera County, California most of which is planted to pistachios ("CENTRAL GREEN"). CENTRAL GREEN is represented by Timothy Jones of McCormick, Barstow, Sheppard, Wayte & Carruth.

2. Defendant UNITED STATES OF AMERICA has been sued because through the Department of Interior and the Bureau of Reclamation the UNITED STATES OF AMERICA

owns the Madera Canal located in Madera County, California used for the delivery of irrigation water which passes through Plaintiff's real property ("UNITED STATES"). The UNITED STATES is represented by Charles J. Stevens and Daniel E. Bensing of the United States Attorney's Office.

3. Defendant MADERA IRRIGATION DISTRICT has an agreement with the UNITED STATES to operate and maintain the Madera Canal ("MID"). MID is represented by Rick Jensen of Hager, Trippel, Macy & Jensen.

4. The First Amended Complaint is styled in four claims for Inverse Condemnation (First Claim), Continuing Nuisance (Second Claim), Continuing Trespass (Third Claim) and Dangerous Condition of Real Property (Fourth Claim). All of the claims arise out of damages which allegedly have been and are continuing to be incurred by CENTRAL GREEN for water which is leaking out of the Madera Canal onto and under Plaintiff's property damaging pistachio trees and increasing cultural costs of the property.

5. UNITED STATES answered the First Amended Complaint denying the material allegations thereof and alleging affirmative defenses of failure to state a claim, lack of subject matter jurisdiction, sovereign immunity and statute of limitations. MID answered the First Amended Complaint denying the material allegations thereof and alleging affirmative defenses of failure to state a claim, bar of limitations, laches, Plaintiff's negligence, Plaintiff's intentional conduct, assumption of the risk, failure to mitigate damages, intervening/superseding causes, act of God/natural condition, prescriptive easement, coming to the nuisance, privilege, lack of unreasonable interference, equitable estoppel, authorized conduct, and intervening superseding cause.

II

LEGAL CONTENTIONS

A. Plaintiff's Legal Contentions

6. CENTRAL GREEN contends that water is leaking from the Madera Canal onto and under its property thereby constituting a trespass, nuisance and inversely condemning its property since the escaping water has damaged the roots of its trees and increased its cultural costs due to the problems associated with having excess water on its property which interferes with normal cultural practices. Additionally, the value of the land is diminished to the extent the trespass and/or nuisance cannot be completely abated such that defendants have inversely condemned Plaintiff's property.

7. Plaintiff asserts that either or both the UNITED STATES and MID are responsible for the leakage problem. The UNITED STATES constructed and generally has maintained the Madera Canal for some period of time. The UNITED STATES has entered into an agreement with MID whereby MID is allowed to flow water through the canal in return for which MID must maintain the canal to prevent leakage of the type that is occurring.

8. While plaintiff understands that both MID and the UNITED STATES want to point the finger at each other (MID contends it is a construction problem while the UNITED STATES contends it is a maintenance problem) one thing is clear, the canal leaks and it is damaging Plaintiff's property.

9. Plaintiff asserts that jurisdiction is appropriate in this Court since the UNITED STATES is a party and further that venue is appropriate since the real property in issue is located in Madera County, California.

B. Defendants Legal Contentions

10. The UNITED STATES contends that the to the extent any water is leaking from the Madera Canal it is MID's responsibility for maintaining the canal and that it either is directly responsible to plaintiff for any such leakage or is

required to indemnify the UNITED STATES to the extent such leakage occurs and is subject to the provisions of the agreement between the UNITED STATES and MID.

11. The UNITED STATES further contends that this Court is not the appropriate court for litigation of Plaintiff's inverse condemnation claim and that the Court of Claims is the only appropriate court, and that Plaintiff's claims are barred by flood water immunity, discretionary function immunity and statute of limitations.

12. MID contends that if the Madera Canal is leaking onto Plaintiff's property it is a construction defect, not the subject of its maintenance agreement with the UNITED STATES and therefore MID is not responsible for the alleged leakage.

13. Defendants do not challenge venue in this Court but the UNITED STATES asserts lack of jurisdiction as mentioned above.

III

FACTS

A. Admitted Facts Which Are Deemed Proven Without Further Proceedings.

1. The Madera Canal passes through portions of Plaintiff's property.

2. The UNITED STATES constructed the Madera Canal through the Department of Interior, United States Bureau of Reclamation.

3. The UNITED STATES entered into an agreement with MID whereby MID was allowed to flow water through the Madera Canal on the terms and conditions specifically set forth in the agreement.

B. Contested Facts

1. Whether Water has been leaking from the Madera Canal onto and under Plaintiff's property.

2. Whether the cause of water leaking from the Madera Canal onto and under Plaintiff's property is a construction defect or a problem caused by poor maintenance.

3. Whether sufficient water has leaked from the Madera Canal to cause damage to Plaintiff's trees.

4. Whether sufficient water has leaked from the Madera Canal to increase Plaintiff's cultural costs and the extent of such increase.

5. Whether the water which has leaked from the Madera Canal has inversely condemned Plaintiff's property by causing damages of the type constituting inverse condemnation.

6. The value of Plaintiff's property.

7. The value of Plaintiff's trees which have been damaged.

8. The amount of cultural costs plaintiff has incurred in dealing with water which has leaked from the Madera Canal.

9. Whether plaintiff properly complied with governmental claim statutes.

10. Whether defendants properly denied Plaintiff's governmental claims.

11. Whether water leaking from the Madera Canal has caused a nuisance on Plaintiff's property.

12. Whether water leaking from the Madera Canal has caused a trespass to Plaintiff's property.

13. Whether water leaking from the Madera Canal has created a dangerous condition of real property.

14. Whether plaintiff failed to timely file this complaint under relevant Code of Civil Procedure §§ 337.1, 337.15, 338 and 343.

15. Whether plaintiff was negligent relative to its operation of the subject real property and thereby caused any of its own damages.

16. Whether plaintiff intentionally caused any of its own damages.

17. Whether plaintiff assumed the risk of any of the damages alleged in the complaint.

18. Whether plaintiff failed to mitigate its damages.

19. Whether actions of plaintiff were caused by intervening or superseding causes unrelated to these defendants.

20. Whether the injuries to plaintiff were caused by a natural condition and/or an act of God sufficient to bar any claim by way of the First Amended Complaint.

21. Whether a prescriptive easement bars Plaintiff's claims.

22. Whether plaintiff "came to the nuisance" thereby barring it from any relief alleged in the First Amended Complaint.

23. Whether or not any of defendants' conduct was privileged.

24. Whether defendants' conduct does not constitute an unreasonable interference with the use of Plaintiff's land.

25. Whether plaintiff is equitably estopped from asserting the claims of the complaint.

26. The nature and extent of Plaintiff's claimed damages.

27. When Plaintiff's injuries occurred.

28. Whether any actions by the UNITED STATES which allegedly caused Plaintiff's injuries were motivated by economic and social policy factors.

IV

AMENDMENTS, DATES AND OTHER ISSUES

A. Amendment Of Pleadings

14. The parties do not anticipate amending the pleadings at this time.

B. Discovery Plan And Cut-Off Dates

15. The parties are ordered to complete all discovery on or before November 7, 1997.

16. The parties are ordered to exchange expert witness disclosures on or before August 15, 1997. Local Rule 253(b) notwithstanding, the written designation of experts shall be made pursuant to Federal Rule of Civil Procedure Rule 26(a)(2), (A) and (B) and shall include all information required thereunder. The provisions of Federal Rule of Civil Procedure Rule 26(b)(4) shall apply to all discovery related to experts in their opinions. The parties shall be allowed to depose expert witnesses whose depositions shall be completed on or before November 7, 1997.

C. Pre-Trial Motions Schedule

17. All non-dispositive pre-trial motions, including any discovery motions, are to be filed on or before November 24, 1997 and heard on Mondays at 10:00 a.m. in Courtroom 4 before the Honorable Sandra M. Snyder, United States Magistrate Judge.

18. All dispositive pre-trial motions are to be filed on or before December 15, 1997, and are to be heard on Mondays at 1:30 p.m. in Courtroom 1 before the Honorable Robert E. Coyle, United States District Court Judge.

D. Pre-Trial Conference Date

19. February 2, 1998, at 2:00 p.m. in Courtroom 4 before the Honorable Sandra M. Snyder, United States Magistrate Judge.

E. Trial Date

20. March 24, 1998, at 10:00 a.m. in Courtroom 1 before the Honorable Robert E. Coyle, United States District Court Judge.

21. All parties except the UNITED STATES have requested trial by jury. Counsel estimate that it will take 7 court days to try the case.

F. Settlement Conference

22. To be established by the Court.

G. Request For Bifurcation, Appointment Of Special Master Or Other Techniques To Shorten Trial

23. Reserved.

H. Related Matters Pending

24. There are no pending related matters.

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

DATED: September 19, 1996 By: /s/
TIMOTHY JONES

HAGER, TRIPPEL, MACY & JENSEN

DATED: September 19, 1996 By: /s/
RICK JENSEN

UNITED STATES ATTORNEY'S OFFICE

DATED: September 19, 1996 By: /s/
DANIEL E. BENSING

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA, MADERA IRRIGATION DISTRICT, Defendants.	CV-F-96-5541-REC-SMS SCHEDULING CONFERENCE ORDER Expert Disclosure Deadline: 8/15/97 Supplemental Expert Disclosure Deadline: 9/12/97 Discovery Deadline: 11/7/97 Non-Dispositive Motion Filing Deadline: 11/24/97 Dispositive Motion Filing Deadline: 12/15/97 Pre-Trial Conference Date: 2/3/98, 2:00 pm, Ctrm. 4 Trial Date: 3/24/98, 10:00 am, Ctrm. 1 (JT - 7 days)

1. Date of Scheduling Conference:
September 26, 1996.
2. Appearances of Counsel:
Peter L. Simon of McCormick, Barstow, Sheppard, Wayte & Carruth appeared on behalf of plaintiff.
Assistant U.S. Attorney Daniel E. Bensing appeared on behalf of defendant, United States of America ("USA").
Rick E. Jensen of Hager, Trippel, Macy & Jensen appeared on behalf of defendant, Madera Irrigation District ("MID").
3. The Pleadings:
A. Summary of the Pleadings.

Plaintiff is a limited partnership which owns certain real property located in Madera County, California, most of which is planted to pistachios.

Defendant USA has been sued because through the Department of Interior and the Bureau of Reclamation, the USA owns the Madera Canal located in Madera County, California, used for the delivery of irrigation water which passes through Plaintiff's real property.

Defendant MID has an agreement with the USA to operate and maintain the Madera Canal.

The First Amended Complaint is styled in four claims for Inverse Condemnation, Continuing Nuisance, Continuing Trespass, and Dangerous Condition of Real Property. All of the claims arise out of damages which allegedly have been and are continuing to be incurred by plaintiff for water which is leaking out of the Madera Canal onto and under Plaintiff's property damaging pistachio trees and increasing cultural costs of the property.

Defendant USA answered the First Amended Complaint denying the material allegations thereof, and alleging affirmative defenses of failure to state a claim, lack of subject matter jurisdiction, sovereign immunity, and statute of limitations. Defendant MID answered the First Amended Complaint denying the material allegations thereof, and alleging affirmative defenses of failure to state a claim, bar of limitations, laches, Plaintiff's negligence, Plaintiff's intentional conduct, assumption of the risk, failure to mitigate damages, intervening/superseding causes, act of God/natural condition, prescriptive easement, coming to the nuisance, privilege, lack of unreasonable interference, equitable estoppel, authorized conduct, and intervening superseding cause.

Plaintiff's Contentions:

Plaintiff contends that water is leaking from the Madera Canal onto and under its property thereby constituting a trespass, nuisance, and inversely condemning its property since the escaping water has damaged the roots of its trees and

increased its cultural costs due to the problems associated with having excess water on its property which interferes with normal cultural practices. Additionally, the value of the land is diminished to the extent the trespass and/or nuisance cannot be completely abated such that defendants have inversely condemned Plaintiff's property.

Plaintiff asserts that either or both defendants are responsible for the leakage problem. Defendant USA constructed and generally has maintained the Madera Canal for some period of time. Defendant USA has entered into an agreement with defendant MID whereby MID is allowed to flow water through the canal in return for which MID must maintain the canal to prevent leakage of the type that is occurring.

While plaintiff understands that both defendants want to point the finger at each other (MID contends it is a construction problem while the USA contends it is a maintenance problem), one thing is clear that the canal leaks and it is damaging Plaintiff's property.

Defendants' Contentions:

Defendant USA contends that to the extent any water is leaking from the Madera Canal, it is defendant MID's responsibility for maintaining the canal, and that it either is directly responsible to plaintiff for any such leakage or is required to indemnify the USA to the extent such leakage occurs and is subject to the provisions of the agreement between defendants.

Defendant MID contends that if the Madera Canal is leaking onto Plaintiff's property, it is a construction defect, not the subject of its maintenance agreement with the USA and, therefore, MID is not responsible for the alleged leakage.

B. Orders Re: Amendment of Pleadings.

No amendments are proposed at this time.

C. Consent To Proceed Before U.S. Magistrate.

This case will not be assigned for all intents and purposes, including trial, to the Honorable Sandra M. Snyder, U.S. Magistrate Judge, as the parties do not so consent.

4. Factual Summary:

A. Admitted Facts which are deemed proven without further proceedings.

(1) The Madera Canal passes through portions of Plaintiff's property.

(2) Defendant USA constructed the Madera Canal through the Department of Interior, United States Bureau of Reclamation.

(3) Defendant USA entered into an agreement with defendant MID whereby MID was allowed to flow water through the Madera Canal on the terms and conditions specifically set forth in the agreement.

B. Contested Facts.

(1) Whether water has been leaking from the Madera Canal onto and under Plaintiff's property.

(2) Whether the cause of water leaking from the Madera Canal onto and under Plaintiff's property is a construction defect or a problem caused by poor maintenance.

(3) Whether sufficient water has leaked from the Madera Canal to cause damage to Plaintiff's trees.

(4) Whether sufficient water has leaked from the Madera Canal to increase Plaintiff's cultural costs and the extent of such increase.

(5) Whether the water which has leaked from the Madera Canal has inversely condemned Plaintiff's property by causing damages of the type constituting inverse condemnation.

(6) The value of Plaintiff's property.

(7) The value of Plaintiff's trees which have been damaged.

(8) The amount of cultural costs plaintiff has incurred in dealing with water which has leaked from the Madera Canal.

(9) Whether plaintiff properly complied with governmental claim statutes.

(10) Whether defendants properly denied Plaintiff's governmental claims.

(11) Whether water leaking from the Madera Canal has caused a nuisance on Plaintiff's property.

(12) Whether water leaking from the Madera Canal has caused a trespass to Plaintiff's property.

(13) Whether water leaking from the Madera Canal has created a dangerous condition of real property.

(14) Whether plaintiff failed to timely file the complaint under relevant Code of Civil Procedure §§ 337.1, 337.15, 338, and 343.

(15) Whether plaintiff was negligent relative to its operation of the subject real property and thereby caused any of its own damages.

(16) Whether plaintiff intentionally caused any of its own damages.

(17) Whether plaintiff assumed the risk of any of the damages alleged in the complaint.

(18) Whether plaintiff failed to mitigate its damages.

(19) Whether actions of plaintiff were caused by intervening or superseding causes unrelated to these defendants.

(20) Whether the injuries to plaintiff were caused by a natural condition and/or an act of God sufficient to bar any claim by way of the First Amended Complaint.

(21) Whether a prescriptive easement bars Plaintiff's claims.

(22) Whether plaintiff "came to the nuisance" thereby barring it from any relief alleged in the First Amended Complaint.

(23) Whether any of defendants' conduct was privileged.

(24) Whether defendants' conduct does not constitute an unreasonable interference with the use of Plaintiff's land.

(25) Whether plaintiff is equitably estopped from asserting the claims of the complaint.

(26) The nature and extent of Plaintiff's claimed damages.

(27) When Plaintiff's injuries occurred.

(28) Whether any actions by defendant USA which allegedly caused Plaintiff's injuries were motivated by economic and social policy factors.

5. Legal Issues:

A. Uncontested.

(1) Venue

B. Contested.

(1) Defendant USA contends that this court is not the appropriate court for litigation of Plaintiff's inverse condemnation claim, that the Court of Claims is the only appropriate court, and that Plaintiff's claims are barred by flood water immunity, discretionary function immunity, and statute of limitations.

6. Discovery Plan and Cut-Off Dates:

The parties are ordered to complete all discovery on or before November 7, 1997.

The parties are ordered to disclose all expert witnesses, in writing, on or before August 15, 1997, and all supplemental expert witnesses, in writing, on or before September 12, 1997.

Local Rule 253(b) notwithstanding, the written designation of experts shall **be made pursuant to F.R.Civ.P. Rule 26(a) (2), (A) and (B), and shall include all information required thereunder**. Failure to designate experts in compliance with this Order may result in the court excluding the testimony or other evidence offered through such experts that are not disclosed pursuant to this Order.

The provisions of Fed.R.Civ.P. 26(b) (4) shall apply to all discovery relating to experts and their opinions. Experts must

be fully prepared to be examined on all subjects and opinions included in the designation. Failure to comply will result in the imposition of sanctions.

7. Pre-Trial Motion Schedule:

All Non-Dispositive Pre-Trial Motions, including any discovery motions, are to be filed on or before November 24, 1997, and are heard on Mondays at 10:00 a.m. in Courtroom No.4 before the Honorable Sandra M. Snyder, U.S. Magistrate Judge. **Counsel must comply with Local Rule 251 with respect to discovery disputes or the motion will be dropped from calendar**.

In scheduling such motions, the Magistrate Judge may grant applications for an order shortening time pursuant to Local Rule 142(d). However, if counsel does not obtain an order shortening time, the notice of motion must comply with Local Rule 251.

All Dispositive Pre-Trial Motions are to be filed on or before December 15, 1997, and are heard on Mondays at 1:30 p.m. in Courtroom No.1 before the Honorable Robert E. Coyle, United States District Court Judge. In scheduling such motions, counsel shall comply with **Local Rule 230**.

8. Pre-Trial Conference Date:

February 3, 1998 at 2:00 p.m. in Courtroom No.4 before the Honorable Sandra M. Snyder, U.S. Magistrate Judge.

The parties are ordered to file a **JOINT Pre-Trial Statement pursuant to Local Rule 281(a) (2)**.The parties are further ordered to submit an additional copy of their Joint Pre-Trial Statement on a 3½" computer disc, formatted for **WordPerfect 6.1 for Windows**, directly to the Magistrate Judge's chambers, Third Floor, Room 3419. The computer disc will not be returned unless the parties so request and a self-addressed stamped envelope or mailing container is provided.

Counsels' attention is directed to **Rules 281 and 282 of the Local Rules** of Practice for the Eastern District of California as to the obligations of counsel in preparing for the

Pre-Trial Conference. **The court will insist upon strict compliance with those Rules**.

9. Trial Date:

March 24, 1998 at 10:00 a.m. in Courtroom No.1 before the Honorable Robert E. Coyle, United States District Court Judge.

A. This is a jury trial.

B. Counsels' Estimate of Trial Time:
7 days.

C. Counsels' attention is directed to **Rule 285 of the Local Rules** of Practice for the Eastern District of California.

10. Settlement Conference:

Should the parties desire a Settlement Conference, they will jointly request one of the court, and one will be arranged. In making such request, the parties are directed to notify the court as to whether or not they desire the undersigned to conduct the Settlement Conference or to arrange for one before another Judicial officer.

11. Request for Bifurcation, Appointment of Special Master, or other Techniques to Shorten Trial:

Not applicable at this time.

12. Related Matters Pending:

There are no pending related matters.

13. Compliance with Federal Procedure:

The court requires compliance with the Federal Rules of Civil Procedure and the Local Rules of Practice for the Eastern District of California. To aid the court in the efficient administration of this case, all counsel are directed to familiarize themselves with the Federal Rules of Civil Procedure and the Local Rules of Practice for the Eastern District of California, and to keep abreast of any amendments thereto. The court must insist upon compliance with these Rules if it is to efficiently handle its increasing caseload. Sanctions will be imposed for failure to follow the Rules as provided in both the Federal Rules of Civil Procedure and the Local Rules.

14. Effect of this Order:

The foregoing Order represents the best estimate of the court and counsel as to the agenda most suitable to bring this case to resolution. The trial date reserved is specifically reserved for this case. If the parties determine at any time that the schedule outlined in this Order cannot be met, counsel are ordered to notify the court *immediately* of that fact so that adjustments may be made, either by stipulation or by subsequent Status Conference.

Stipulations extending the deadlines contained herein will not be considered unless they are accompanied by affidavits or declarations and, where appropriate, attached exhibits which establish good cause for granting the relief requested.

FAILURE TO COMPLY WITH THIS ORDER SHALL RESULT IN THE IMPOSITION OF SANCTIONS.

DATED: Sept. 27, 1996

/s/
SANDRA M. SNYDER,
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. ROBERT E. COYLE

CENTRAL GREEN COMPANY, a California Limited Partnership, Plaintiff, vs. UNITED STATES OF AMERICA; MADERA IRRIGATION DISTRICT, Defendants.	CIV-F-96-5541 REC SMS Defendant's Motion for Judgment on the Pleadings

Fresno, California Monday, August 25, 1997

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Peggy J. Smith, Official Reporter

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THE CLERK: Number 27 on the calendar, Civil-F-96-5541 REC, Central Green versus United States, defendant's motion for judgment on the pleadings.

MR. JONES: Timothy Jones, McCormick, Barstow, on behalf of Central Green.

MR. HIMEL: Good day, your Honor, Yoshinori Himel, Assistant United States Attorney, representing defendant movant.

THE COURT: Mr. Jones, Mr. Himel, this is the government's motion in this matter.

Mr. Himel.

MR. HIMEL: Your Honor, I'm prepared to answer questions. I believe that the briefing covers everything that I would have said today.

THE COURT: Mr. Jones?

MR. JONES: Your Honor, it seems to me the question that needs to be addressed here is whether the term "floodwaters" means anything within the immunity provision of the Act, and as interpreted by *James*, and it seems to me that the U.S.' position is that they read that term right out of the statute and right out of the *James* court analysis.

Our position is that the *Sumner Peck* case was a very thorough analysis of exactly what is in issue and why the term "floodwaters" cannot be eliminated from the analysis, and the cases that have gone the other way have followed the *Hayes* line and then the analysis of the *Hayes* line of cases to really focus on whether or not the project itself has as one of its purposes flood control.

If they find that to be the case, that swallows up the whole test of whether or not the immunity applies, and every Ninth Circuit case, except for the *State of Washington* case, has discussed the floodwater question.

Reference is made to *McCarthy*, and as we pointed out in

McCarthy, the court said that they adjusted the level of the lake and that satisfied, from the factual standpoint, whether or not it was floodwater because it was adjusted based on incoming flows.

In the *Morici* case, which is relied on heavily by the U.S., in that case, the court said very clearly *Morici* does not argue in this court that the waters involved were anything other than floodwaters within the meaning of the statute. And so if that was not an appropriate consideration, the court, you know, would not have voted it or whatever. It would have read it out.

THE COURT: Doesn't each Columbia River Basin Irrigation District case pretty well state it can be a multi-purpose and if it's a flood project and one of the purposes is generating electricity or irrigation water, the immunity remains? It's still a flood project.

MR. JONES: You are referring to the *State of Washington versus U.S.* case, your Honor? That's a Ninth Circuit case?

THE COURT: As well as *James*. I think *James* also gives the same result and certainly the Florida case does.

MR. JONES: Well, in *James*, my recollection is *James* involved injuries that occurred in lakes or people who pass through meters, I think it was something like that, and in that case, that's where the court talks about the floodwater issue and the court says that floodwater was not an issue there because there was no dispute as to whether these waters were floodwaters, but the court gave a definition of what is floodwater. That is something that passes through the project for the purpose of or related to flood control.

And if it didn't intend some factual analysis on the issue of what the water was passing through the project for, all it had to say was any water passing through a project that has flood control as any purpose, any part of its purpose would effectively be subject to immunity, and the court didn't say that in *James*.

The court said you have to look at the water and say, one, it passed through the project; and, two, it passed through for

flood control purposes.

And that's exactly what Judge Wanger did in *Sumner Peck*. That issue was raised specifically on the motion for reconsideration. And Judge Wanger said, yes, that it was a project, the purpose had as one of its purposes flood control, but the court had to look at whether or not the water passed through for that purpose or not. It's a factual question that is related to flood control and that's what he decided the case on. It was a question of fact. And he said that they would have to go beyond the motion to dismiss stage.

It seems a bit unfair to immunize the government for any possible occurrence related downstream in an irrigation canal if they are using that water, selling it for irrigation purposes and they are not maintaining that project, if the water is being maintained and let out --

THE COURT: I don't disagree with you. It seems unfair. The question is whether or not the government is immune.

MR. JONES: First you start with the question of whether or not -- I think it's an issue of fairness. Is it an intended immunity to protect the government from this type of a circumstance? Most of the cases have been accident cases. Most of them are accident cases, and the courts note that whether or not it's a floodwater is not an issue.

How can you avoid the *McCarthy* statement that the court looked into whether or not the level of the lake was adjusted to handle incoming flows? If that's not an issue, why would the court have looked at it? If it was not important of what was floodwater, why would the *Morici* court say the parties didn't raise it?

THE COURT: If this is out through a separate channel rather than the regular channel of the river, obviously, it was released under your definition, I would think, to provide more space for floodwaters later on in the season.

MR. JONES: If you look at *McCarthy,* the way the court looked at it, the court said are they adjusting the level of the

lake to accommodate floodwater. Impliedly, that means if they are not adjusting the level of the lake to accommodate waters coming in for flood control purposes, then they are adjusting the level of the lake for some other reason.

If it's adjusted for some other reason, there is a question as to whether or not that's a floodwater. If they are adjusting the level of the lake, let's say, because rather than allowing for incoming flows of the river that might overflow the dam, if they are adjusting the level of the lake for the sole purpose of maintaining water to irrigate later in the season, that has nothing to do with protecting people from floods.

Our position is that consistent with *James*, consistent with *McCarthy* and consistent with the discussion in *Morici* and absolutely on all fours with Judge Wanger's opinion in *Sumner Peck*. The immunity either doesn't apply or it certainly creates a question of fact.

THE COURT: I guess what the Court has to decide then, is Judge Wanger right in interpreting the Ninth Circuit and I agree with his interpretation of *Columbia*, and I would rule in your favor. If I disagree with that interpretation, then I don't. I guess that's what that --

MR. JONES: We are walking along his analysis relatively carefully, your Honor, but I still think that to disagree with the interpretation, you have to read out the language in *McCarthy,* you have to read out some of the language in the definition of floodwater in *James*. And I think it really will do violence to what was intended by the Act. As broad as it might be, I think it is an overreaching.

THE COURT: Anything further on behalf of the government?

MR. HIMEL: Yes, your Honor, very briefly. Plaintiff's counsel conceded that under the test that he argues, if the sole purpose of the releases from the dam that will resulted in water going through the irrigation canal were flood control, then he would concede that the government was immune from releasing

the releases of that water.

The point that the court – that the Ninth Circuit decided and this Court has repeated in some of its decisions in the Ninth Circuit's *Morici* case was the difficulty of assigning a purpose to particular releases, and because of that factual difficulty, the plaintiff has conceded, too, that he thinks it's a factual question, and thinks it's necessary to make a factual issue.

It's the difficulty of that factual issue that caused the Ninth Circuit, as one of its reasons in *Morici*, to reach a result that is contrary and rules contrary to what the plaintiff argues for. Thank you very much, your Honor.

THE COURT: Thank you. The matter stands submitted.

(The proceedings were concluded.)

I, PEGGY J. SMITH, Official Reporter, do hereby certify the foregoing transcript as true and correct.

DATED: 12-16-97

/s/
PEGGY J. SMITH

Supreme Court, U.S.
FILED
JUN - 5 2000
CLERK

No. 99-859

IN THE

Supreme Court of the United States

Central Green Co.,
Petitioner,

v.

United States of America,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONER

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June 5, 2000

QUESTION PRESENTED

Petitioner brought this suit against Respondent United States because Petitioner's property has been damaged by *irrigation waters* leaking from a federal *irrigation canal*. Respondent argued that the suit was barred by 33 U.S.C. § 702c, which immunizes the federal government from liability for damage caused by "floods or flood waters." The district court and Ninth Circuit agreed, holding that the waters were "flood waters" as a matter of law under its settled precedent. But the court of appeals acknowledged that its decision likely could not be reconciled with this Court's holding in *United States* v. *James*, 478 U.S. 597, 605 (1986), that "flood waters" include only those waters carried in "a flood control project for purposes of or related to flood control."

The Question Presented is:

Whether 33 U.S.C. § 702c renders Respondent immune from Petitioner's suit as a matter of law.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the Madera Irrigation District was a party to the proceedings below.

Petitioner Central Green Company is a limited partnership with no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court's opinion dismissing the complaint as to Respondent is reprinted in the appendix to the Petition for a Writ of Certiorari ("Cert. App.") at 10a-20a. The court of appeals' opinion affirming the district court's judgment is reported at 177 F.3d 834 and reprinted at Cert. App. 1a-9a. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Cert. App. 21a.

JURISDICTION

The court of appeals entered its order denying rehearing and rehearing en banc on September 7, 1999. Petitioner filed a Petition for a Writ of Certiorari on November 19, 1999, which this Court granted on March 20, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The immunity provision of the Flood Control Act of 1928, 33 U.S.C. § 702c, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT

This case involves the scope of the federal government's immunity from suit under a section of the Flood Control Act of 1928 ("the Act" or "the Flood Control Act") providing that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c ("Section 702c"). This suit arises from damage caused by irrigation waters leaking onto Petitioner's property from a federal irrigation canal. The panel of the Ninth Circuit that heard this case recognized that, because the canal "is not a flood control project and serves no

flood control purpose," Cert. App. 9a, Respondent should *not* be entitled to immunity under this Court's holding in *United States* v. *James* that Section 702c applies only to waters "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. 597, 605 (1986). The panel nonetheless found itself bound to find Respondent immune based on longstanding Ninth Circuit precedent holding that Section 702c applies to *any* water carried for *any* purpose in *any* facility that is even nominally *part* of a larger federal water project that has flood control as *one* of its purposes. Other circuits have rejected the Ninth Circuit's standard because it conflicts with *James*, "makes little sense in light of the text and purposes of the Act," and extends well beyond where "Congress intended to stretch the shield of flood control immunity." *Cantrell* v. *United States*, 89 F.3d 268, 271 (CA6 1996); *Boyd* v. *United States*, 881 F.2d 895, 900 (CA10 1989). Expressly recognizing this compelling, contrary authority, the panel invited this Court to grant certiorari to review its decision. Cert. App. 9a.

1. Petitioner owns a pistachio farm in California's San Joaquin Valley. The farm is traversed by the Madera Canal ("the Canal"), which is an irrigation canal that carries irrigation water through the Valley (although not to Petitioner's farm). This suit arises because the Canal leaks, raising the water table and damaging Petitioner's farm.

Petitioner, seeking to have the Canal repaired and to be compensated for the damage it had incurred, sued Respondent United States (which designed, constructed, and owns the Canal) under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, as well as the Madera Irrigation District (which operates the Canal under contract to the federal government). According to the complaint, the Canal "is used to convey irrigation water to various lands in the San Joaquin Valley." Joint Appendix ("J.A.") 8, ¶ 7; see also *id.* at 7, ¶ 2 (canals operated by Respondent are "used for delivery of irrigation water to farmers"). Petitioner asserted that the defendants' conduct constituted a nuisance, trespass, and the creation of a dangerous condition to real property. See J.A. 10-13.

After filing its answer and before any factual development in the case, Respondent moved for judgment on the pleadings on the basis of Section 702c. Respondent accepted for purposes of its motion that the complaint's "factual allegations [were] true," including specifically that the Canal "is used to convey irrigation water." Resp. Mo. for J. on Pleadings 2, ¶ 3, *reprinted in* Ct. of App. Excerpts of Rec. ("C.A. E.R.") 139. Respondent noted, however, that the Madera Canal is part of the "Friant Division" of a massive federal water project known as the Central Valley Project ("CVP"). Specifically, the Canal transports water from Millerton Lake, a reservoir created by Friant Dam, which is one of more than 20 dams in the CVP.

Respondent relied on longstanding Ninth Circuit precedent holding that "flood waters" include all waters "not wholly unrelated" to a flood control *project*, even if "devoted solely to irrigation purposes." *Id.* at 7 (citing *Washington* v. *East Columbia Basin Irrig. Dist.*, 105 F.3d 517 (CA9), *cert. denied*, 552 U.S. 948 (1997); *McCarthy* v. *United States*, 850 F.2d 558, 562 (CA9 1988), *cert. denied*, 489 U.S. 1052 (1989); *Morici Corp.* v. *United States*, 681 F.2d 645, 647 (CA9 1982)). Those precedents furthermore deem each and every component of multi-purpose, multi-facility water projects such as the CVP to be a "flood control project," relying on congressional statements that the projects' authorized purposes include "flood control" and the government's assertion that the projects operate as an "integrated whole." *Id.* at 9. Thus, *solely* because Madera Canal is nominally part of the CVP, Respondent asserted that, under Ninth Circuit precedent, all of the water in the Canal is "flood water."

2. The district court granted Respondent's motion for judgment on the pleadings and the Ninth Circuit affirmed, although it expressed grave doubts that its holding comported

with this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986).[1] According to *James*, the Flood Control Act

> concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "floods" and "flood waters" apply to all waters contained in or carried through a federal flood control project *for purposes of or related to flood control*, as well as waters that such projects cannot control.

Id. at 605 (emphasis added). The Ninth Circuit recognized that "[t]he Madera Canal disburses irrigation water throughout the San Joaquin Valley." Cert. App. 9a. Moreover, "flood control is not one of the stated purposes of the Madera Canal." *Id.* at 8a. Thus, "[t]he canal is *not* a flood control project and serves *no* flood control purpose" and "the water in the Madera Canal was *not* held for the purpose of flood control." *Id.* at 8a-9a (emphasis added).

The court of appeals nonetheless found itself bound by settled Ninth Circuit precedent to hold the government immune from Petitioner's suit because the water in question was "not wholly unrelated" to the Madera Canal. The Canal, in turn, is a "flood control project" under Ninth Circuit precedent because it is nominally part of the CVP, which in turn "has flood control as one of its congressionally authorized purposes." Cert. App. 2a. Under these precedents, "[t]here does not appear to be any set of facts where the government is not immune from damage arising from water that at one time passed through part of the Central Valley or other flood control project." *Id.* at 9a.

The court of appeals frankly acknowledged that Ninth Circuit precedents "seem to delete" a critical element of this

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[1] See Cert. App. 10a-20a (district court opinion); J.A. 5 ¶ 28 (noting entry of judgment under FRCP 54(b)); Cert. App. 1a-9a (court of appeals opinion).

Court's holding in *James*: that immunity applies only if the waters are carried "for purposes of or related to flood control." Cert. App. 7a. It further acknowledged that several other circuits "have found [the Ninth Circuit's] standard to be too broad and require a more *substantial nexus* between flood control activities and the damage incurred." *Id.* at 4a (emphasis added). The panel accordingly invited this Court to review this case. *Id.* at 9a. After the Ninth Circuit denied rehearing en banc, *id.* at 21a, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's holding that Section 702c renders Respondent immune from Petitioner's suit conflicts with both aspects of the definition of "flood waters" announced by this Court in *James*: the waters in this case were neither "contained in or carried through a flood control project" nor so-carried "for purposes of or related to flood control." 478 U.S. at 605. First, as the panel below recognized, the Ninth Circuit's definition of "flood waters" as including all waters in a flood control project without regard to whether those waters served a flood control function "deletes" *James*' requirement that the waters be carried "for purposes of or related to flood control." In this case, the waters do not satisfy the test announced in *James*, because the Madera Canal "serves no flood control function." *Id.* 9a. Instead, the Canal is an irrigation project that has as its exclusive purpose the delivery of irrigation water. Indeed, this inconsistency with *James* is confirmed by numerous sources: provisions of the Flood Control Act expressly distinguishing "flood waters" from waters diverted to other beneficial uses such as irrigation; a federal statute (33 U.S.C. § 709), regulation, and water control agreement that distinguish the flood control operation of Friant Dam from diversions for irrigation purposes; the fact that Respondent recoups the costs of irrigation uses through charges to irrigation users; and Respondent's repeated recognition that the Madera Canal is an "irrigation facility" carrying "irrigation water" rather than "flood waters."

Second, the waters in this case were not "carried in a flood control project" as *James* requires. This Court squarely held in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), that Friant Dam is a "reclamation project" rather than a "flood control project." The same is true of the Madera Canal. Both the Dam and the Canal were funded under the reclamation laws, not statutes governing the construction of flood control projects, such as the Flood Control Act of 1928. Indeed, the legislative history of the 1928 Act makes very clear that Congress did not intend the Act's provisions to apply to reclamation developments.

Given the clear conflicts between the Ninth Circuit's holding in this case and *James*, the judgment should be reversed on the ground that Respondent is not entitled to immunity under Section 702c. Alternatively, if some doubts remain regarding whether Petitioner was damaged by "flood waters," the case should be remanded. The district court dismissed the complaint on the pleadings without giving Petitioner any opportunity to develop and prove facts that would have shown that the waters were not "contained in or carried through a flood control project for purposes of or related to flood control." Thus, to the extent that Respondent advances arguments that the waters in the Canal as a factual matter serve a substantial flood control function, such claims should be resolved on remand rather than in this Court in the first instance.

ARGUMENT

I. Section 702c Applies Only To Waters Carried Primarily For Flood Control Purposes, Not To All Waters Carried In A Flood Control Project

The Ninth Circuit erroneously held that Respondent is immune in this case because Petitioner was damaged by waters that were carried in a flood control *project*, notwithstanding that those waters served absolutely no flood control *function*. The Ninth Circuit's ruling conflicts not only with

James, as the panel itself recognized, *id.* at 7a, but also with the Flood Control Act's text and legislative history, as well as Congress' intent in enacting the Federal Tort Claims Act. Properly construed, Section 702c applies only to waters that primarily serve the purpose of flood control. Although some circuits apply Section 702c to waters that are "not wholly unrelated" to flood control activities, they do not generally read that test to extend to waters only incidentally related to flood control.

Respondent in two briefs filed in opposition to certiorari in this case did not seriously attempt to defend the Ninth Circuit's standard and, indeed, seemed to agree that immunity applies only to waters that have at least a substantial nexus to flood control efforts. Thus, the brief in opposition surveys the circuit authority and asserts with approval that, in cases "involving injuries more remotely related to federal flood control efforts, [the courts of appeals] have held the government subject to suit." BIO 12-13 & n.5; see also Cert. App. 4a (noting that several circuits require a "substantial nexus" to flood control efforts). Among the decisions cited by Respondent is *Henderson* v. *United States*, 965 F.2d 1488 (1992), in which the Eighth Circuit rejected the government's assertion that it was immune for injuries caused by a water release that unquestionably reduced the water level of a flood control lake. The court applied its substantial-factor test by determining the "primary purpose" served by the waters in question. Specifically, it held that the government was not immune because "the primary purpose behind operating the dam is generating electric power" and the release in question was ordered "with the commercial purpose of generating power." 965 F.2d at 1492. For the reasons we explain below, this inquiry into whether waters have a substantial nexus to flood control, as determined by the "primary purpose" served by the waters, is the correct reading of Section 702c.

Ultimately, however, the particular formulation used to apply Section 702c makes no difference in this case because

the waters that damaged Petitioner cannot possibly be deemed "flood waters" under any standard that requires anything more than the most extraordinarily attenuated relationship to flood control activities. A large proportion of the waters that damaged Petitioner were not "flood waters" even when originally stored behind Friant Dam, given that (a) there is absolutely no risk of floods on the San Joaquin River for much of the year, and (b) throughout the year, the great majority of the water stored behind the Dam simply constitutes the river's normal flow (rather than water that would have overridden the river's banks) and is retained only for irrigation, not to control floods. To the extent that these waters sometimes fill Millerton Lake to capacity, that is only because Respondent stores them for irrigation rather than allowing them to pass into the river bed below the Dam. Furthermore, water is diverted into the Madera Canal solely for irrigation pursuant to regulations that distinguish irrigation releases from flood control releases. Finally, the Canal is a separately designated "irrigation facility" and Respondent recoups all of its costs relating to distribution of the water from irrigation users. Indeed, Respondent consistently refers to the water in the Canal as "*irrigation water*," not "flood waters."

A. This Court's Decision In *James*

Congress enacted the Flood Control Act of 1928 in response to the great Mississippi River flood of 1927, which resulted in more than 200 deaths, left almost 700,000 people homeless, and caused more than $200 million in property damage. Congress deemed previous efforts to control flooding in the region through the use of levees a failure. The Act thus called on the Army Corps of Engineers to implement "a comprehensive ten-year program for the entire [Mississippi] valley, embodying a general bank protection scheme, channel stabilization and river regulation, all involving vast expenditures of public funds." *United States* v. *Sponenbarger*, 308 U.S. 256, 262 (1939); see also *Hurley* v. *Kincaid*, 285 U.S. 95, 99 (1932). In order to avoid exposing the federal government to liability for its flood control efforts in the Mississippi River Valley, Congress provided that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," 33 U.S.C. § 702c.

This Court interpreted Section 702c in *United States* v. *James*, 478 U.S. 597 (1986), a consolidated case which arose when government employees negligently opened locks at two federal flood control projects (a flood control dam and a flood control drainage structure), causing recreational boaters to be swept away to their deaths. The district courts held that, although the government had failed to provide sufficient warning before releasing the water, it was nonetheless immune under Section 702c because the deaths had resulted from "flood waters." Specifically, the dam and drainage structure were federal "flood control" facilities and the government had released the water in order to reduce the reservoirs from flood stage. This Court rejected the plaintiffs' argument that the Act does not apply to "the negligent or wrongful acts of government employees," explaining that Section 702c's reference to "any damage from or by floods or flood waters at any place" is "sweeping." 478 U.S. at 603-04 (citation and quotation marks omitted).

James took care to explain, however, that the Flood Control Act's reference to "floods or flood waters" limits the scope of the government's immunity. According to the Court, "flood waters" are those with a direct nexus to flood control efforts:

> The Act concerns flood control projects designed to control flood waters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project *for purposes of or related to flood control*, as well as to waters that such projects cannot control.

James, 478 U.S. at 605 (emphasis added). In an accompanying footnote, the Court noted that some circuits confer immunity for damages caused by waters "not wholly unrelated" to flood control activities, but it did not endorse that test. Accord *Fryman* v. *United States*, 901 F.2d 79, 82 (CA7 1990) (per Easterbrook, J.) (explaining that, although *James* noted the "not wholly unrelated" standard, it "did not adopt the 'wholly unrelated'" test).

This Court's decision in *James* is flatly inconsistent with the Ninth Circuit's reading of Section 702c. *James* limits "flood waters" to those carried "for purposes of or related to flood control." In point of fact, the Solicitor General had broadly asserted in his brief in *James* that immunity applies to all waters in any flood control project, even if those waters were not related to the purpose of flood control, arguing that Section 702c encompasses "*all* waters contained in or carried through such structures as well as waters the structures could not retain." Br. for U.S., No. 95-434, *United States* v. *James* 17 (emphasis added). But this Court declined to adopt such an expansive reading of "flood waters," a point not lost on the panel below, which expressly recognized that Ninth Circuit precedents "seem to delete" *James*' requirement of a direct nexus to flood control efforts. Cert. App. 4a.

Furthermore, although *James* did not resolve precisely what degree of "relationship" to flood control activities is sufficient to confer immunity under Section 702c, the Court's opinion does strongly suggest that a substantial relationship is required. The Court emphasized that the waters in question were directly related to flood control activities, explaining that the government was entitled to immunity because "the District Court in each case found that the waters were being released from federal flood control facilities *to prevent flooding*." 478 U.S. at 605 n.7 (emphasis added). The Court made the same point when it rejected the plaintiffs' claim that "their injuries arose from Government employees' alleged mismanagement of recreational activities" on the ground that

"the release of the waters * * * was *clearly related to flood control*." *Id.* at 609-10 (emphasis added).

B. The Text And Legislative History Of The Flood Control Act

1. The text of the Flood Control Act similarly demonstrates that Respondent's immunity extends only to waters carried principally for the purpose of flood control. The Ninth Circuit held that Respondent is immune for damage caused by all waters in a flood control project notwithstanding that its definition of a "flood control project" encompasses all facilities that are nominally *part* of a larger project that has "flood control" as *one* of its authorized purposes – including facilities that (like the Madera Canal here) are not even authorized for flood control uses and that do not provide flood control benefits – and therefore sweeps in all manner of waters that have no relationship to flood control efforts. That holding cannot be reconciled with the plain text of Section 702c.

Congress only provided that the government would be immune for damage caused by "floods" and "flood waters." It could have enacted a broader immunity provision – one that applied, for example, to "all activities related to a federal flood control project," "all waters in a federal flood control project," or "all waters that pass through a federal flood control project" – but it did not. And, plainly, that choice was a conscious one: numerous provisions of the Act show that Congress was well aware of the difference between "floods" and "flood waters," on the one hand, and "flood control facilities" and "flood control works," on the other.[2] Accord Br.

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[2] See 33 U.S.C. § 702c (discussing "floods" and "flood waters" separately from "flood-control works" such as "spillway structures, including special relief levees"); *id.* § 702 (discussing "flood waters" separately from "levees constructed for flood control"); *id.* § 702b (discussing "floods" and "flood waters" separately from "flood control work"); *id.* § 702d (discussing "flood waters"

of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 33 n.50 (explaining that, with respect to Flood Control Act of 1944, "when Congress wished to describe particular physical works * * * it specifically used the word 'works'").

Indeed, another section of the Act *does* immunize the government for damages caused by a specific project, a provision that demonstrates that Congress was fully capable of immunizing the government for all damages relating to flood control facilities and that, indeed, would seem to be superfluous under the reading that the Ninth Circuit and Respondent attribute to Section 702c. See 33 U.S.C. § 702j-2 (requiring that local authorities "hold and save the United States free from liability for damages on account of the use of said area [the White River Levee District] for reservoir purposes during said emergency").

Not only did Congress not provide that the government would be immunized for all of the activities of a flood control project, but it also did not extend Section 702 to all "waters." Instead, Congress consciously used the more limited term "*flood* waters," which, although not defined in the Act, has the plain meaning of "the water of a flood." Webster's Third Int'l Dictionary 873 (1981). To be sure, under an extraordinarily expansive, almost metaphysical definition, all water is "flood water" because all water was at some point in history part of a flood before being recycled into the environment. Thus, the water in the CVP may be contained to prevent a flood, then be distributed for irrigation, then evaporate, then fall as rain water, and then be consumed by humans. But at some point, it must lose its character as "flood water" and be-

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separately from "works of flood control"); *id.* § 702g (discussing damage caused "by flood" separately from "maintenance of any flood-control work"); see also *infra* at 16-19 (discussing proposed provision of Federal Tort Claims Act, not enacted by Congress, that would have granted government immunity for all damages caused by flood control projects).

come, in the commonly understood sense, "irrigation water," "rain water," and later "drinking water." If Congress intended to extend Section 702c more broadly than the waters of a flood, it could have and would have used a broader term.

There certainly is no support in the text or the legislative history of the Flood Control Act for the proposition that water stored primarily for irrigation and then diverted for irrigation is "flood water." Numerous provisions of the Act refer to "flood waters," but only in the sense of waters overflowing the bed of a river or held behind levees, as opposed to water put to some other beneficial use. See *supra* at n.2 (citing provisions of the Act referencing "flood waters"). The same is true of the numerous references to "flood waters" in the congressional debates over the Flood Control Act.[3] Furthermore, the Act expressly adopts a report prepared by the Army Corps of Engineers in response to the great flood of 1927, see 33 U.S.C. § 702a, which uses the phrase "flood waters" repeatedly, but never in the context of water diverted for some other beneficial purpose. Indeed, the report expressly distinguishes between the use of reservoirs on the Mississippi for "flood control" and their use "*primarily*" for other purposes. H. Doc. No. 90, Flood Control in the Mississippi Valley 21 (1927) (contrasting use of 203 headwater reservoirs "primarily for Mississippi River control" versus "primarily for other

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[3] E.g., 69 Cong. Rec. 6643 (Apr. 17, 1928) (statement of Rep. Reid) (describing the "flood waters" held behind levees during 1927 flood); *id.* at 6649 (statement of Rep. Driver) (explaining, as accepted premise of flood control efforts, that "floodwaters" must be confined within the river channel); *id.* at 6707 (Apr. 18, 1928) (statement of Rep. Gregory) (describing "flood waters" that inundated Columbus, Ky., in 1927 flood); *id.* at 7023 (Apr. 23, 1928) (statement of Rep. Cox) (in discussion of Section 702c, describing "flood waters" that would overflow lands in floodways); *id.* at 8192 (May 9, 1928) (expressing the view that "we ought not to confuse this project, dealing with the flood waters of the Mississippi River, with the sources of streams and irrigation projects").

purposes, such as power, local flood control, irrigation, etc."); *id.* at 23 ("In summary, the best system of reservoirs that has been found will cost about $240,000,000. When operated primarily for the purpose of flood control on the Mississippi it would not reduce the maximum predicted flood to a discharge which could safely be passed by the present levees.").[4]

2. A separate provision of the Act, 33 U.S.C. § 702j ("Section 702j") – which was enacted contemporaneously with, and is expressly incorporated by, Section 702c – also makes clear that Congress did not regard waters stored and then diverted for some beneficial purpose other than flood control to be "flood waters" for which the government is immune. Section 702j directs the Army Corps of Engineers to study the possible construction of reservoirs on tributaries of the Mississippi River, including particularly the beneficial uses for which water stored in the reservoirs might be used. Importantly, the provision refers to the water as "flood waters" when first contained but "reservoired waters" when put to some other use, such as irrigation. Section 702j thus directs the Secretary of War to submit to Congress a report regarding

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[4] See also, e.g., H. Doc. No. 90, Flood Control in the Mississippi Valley 3 (1927) ("The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways."); *id.* at 4 ("The plan heretofore pursued has been the construction of levees high enough and strong enough to confine all of the flood waters within the river channels."); *id.* at 6 ("To prevent flood waters from entering the Tensas Basin, except into the flood way during high floods, the levees on the south side of the Arkansas will be strengthened and raised about 3 feet as far upstream as necessary."); *id.* at 14 ("The river, in low water and in all stages up to bankful, should be carried in the main channel until we reach the flat land bordering the Gulf of Mexico. All the flood water can not be carried in this one channel.").

> the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the *flood waters* in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to hold *waters from such reservoirs*; the prospective income from the disposal of *reservoired waters*; the extent to which *reservoired waters* may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation * * * .

33 U.S.C. § 702j (emphases added).

The legislative history of Section 702j confirms that Congress did not regard waters stored and then diverted for beneficial purposes such as irrigation as "flood waters." Members of Congress, in discussing the provision, distinguished "flood control" from the other beneficial purposes for which water would be used. E.g., 69 Cong. Rec. 5488 (Mar. 28, 1928) (statement of Sen. Jones) (distinguishing study of "flood control" from "reclamation, water power and navigation"); *id.* at 6771 (Apr. 19, 1928) (statement of Rep. Spears) (distinguishing study of "flood control" from "navigation benefits, agricultural use, and power"). Indeed, they described the reservoirs as "*changing*" the "flood waters" into "water for navigation," *id.* at 7007 (Apr. 23, 1928) (statement of Rep. Simmons) (emphasis added), and creating "water for irrigation," *id.* at 7127 (Apr. 24, 1928) (statement of Rep. Cartwright); *id.* ("Proper flood control, proper water storage, and proper distribution of this stored water will mean bumper crops every

year for every section of the Nation.").[5] Thus, not only did Congress not use the term "flood waters" to describe waters stored and then diverted for some other beneficial purpose, but it also manifestly did not enact an immunity provision encompassing those other uses of water. As a result, even if the waters in the Madera Canal could be said to have once been "flood waters," they plainly lost that character for purposes of Section 702c once retained and diverted principally for the purpose of irrigation.

C. The Federal Tort Claims Act

The Ninth Circuit's construction of Section 702c also cannot be reconciled with Congress' intent in enacting the statute under which Petitioner's suit arises: the Federal Tort Claims Act ("FTCA"). The FTCA grants federal courts jurisdiction over "claims against the United States * * * under circumstances where the United States, if a private person, would be liable to the claimant," 28 U.S.C. § 1346(b), and (with certain exceptions) waives the federal government's sovereign immunity from "tort claims, in the same manner and to the same extent as a private individual under like circumstances," *id.* § 2674. Written in "neither intricate nor restrictive language in waiving the Government's sovereign immunity," *United States* v. *Muniz*, 374 U.S. 150, 152 (1963), the FTCA is designed to encourage government agents to exercise due care and to ensure that injured private parties such as Petitioner will not bear the cost of the government's negligence. Prior to enactment of the FTCA, "[a]s the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs – wrongs which would

[5] See also 69 Cong. Rec. 7119 (Apr. 24, 1928) (statement of Rep. Swank) ("impounded waters" to be placed under the control of the Secretary of the Interior); *id.* at 8188 (May 9, 1928) (statement of Sen. King) (discussing policy of "conserving waters by other means and of utilizing and distributing them for power and irrigation and other purposes").

have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government." *Feres* v. *United States*, 340 U.S. 135, 139-40 (1950). To expand the government's immunity to encompass damages caused by waters that have only an incidental relationship to flood control would contravene Congress' intent by at least countenancing, if not encouraging, governmental negligence (indeed, gross negligence) in controlling those waters and by imposing on innocent parties such as Petitioner the costs of activities that are not directly related to flood control.

Of particular note, Congress repeatedly considered but did not enact exceptions that would have rendered the government immune for all damages caused by the operation of "flood control" and "irrigation" projects. E.g., H.R. 9285, 70th Cong., 1st Sess. § 8(a)(6) (1928); S. 4567, 72d Cong., 1st Sess. § 206(6) (1932); H.R. 17168, 71st Cong., 3d Sess. § 3(a)(6) (1931). This Court has squarely held that Congress' decision not to adopt such exceptions – *including particularly the exceptions for irrigation and flood control projects* – was "a deliberate choice, rather than an inadvertent omission," and that, accordingly, claims that would have been excluded under the exceptions can go forward under the Act. *United States* v. *Muniz*, 374 U.S. 150, 156 & n.9 (1963). The Court made essentially the same point in an earlier case addressing the discretionary function exemption, which was included in the FTCA as finally enacted. In *Dalehite* v. *United States*, 346 U.S. 15 (1953), the Court gave great weight to an excerpt from the legislative history that "appear[ed] time and again" after being endorsed by the Department of Justice:

> This paragraph characterizes the general exemption [for discretionary functions] as "a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, *such as a flood-control or irrigation project,*

> *where no negligence on the part of any Government agent is shown*, and the only ground for suit is the contention that the same conduct by a private individual would be tortious."

346 U.S. at 28 (emphasis added). In dissent, Justice Jackson would have taken an even narrower view of the discretionary function exception, 346 U.S. at 58 n.12, and thus every member of the Court agreed that when activities regarding "a flood control or irrigation project" were not discretionary and did involve "negligence on the part of [a] Government agent," the plaintiff *could* bring suit under the FTCA. See also *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988) (citing *Dalehite* as holding that the discretionary function exception "protects only governmental actions and decisions based on considerations of public policy").

Congress thus did not intend to immunize the government for its negligent operation of flood control projects unless the requirements of the "discretionary function" exception were satisfied. But that is precisely the effect of the standard applied by the Ninth Circuit, which accords the government immunity for all water carried in a flood control project without regard to whether the water directly serves a flood control function. Properly construed, to the extent Petitioner was damaged by waters not carried for the purpose of flood control, the FTCA permits Respondent to defend against Petitioner's suit by establishing (a) that the acts alleged by the complaint fall within the Act's "discretionary function" exception, and/or (b) that the government was not negligent. Not surprisingly, Respondent's answer to the complaint in this case raised both of those defenses, see J.A. 57-61, which must be resolved on remand.

D. Section 702c Applies To Waters Carried "Primarily For Flood Control"

For the reasons explained above, the government is immune under Section 702c only for damage caused by waters

that have at least a substantial nexus to flood control activities. The relevant sources – this Court's decision in *James*, the text and legislative history of the Flood Control Act, and the text and legislative history of the Federal Tort Claims Act – are inconsistent with an exceedingly expansive definition of "flood waters," such as "waters that are literally 'not wholly unrelated' to flood control efforts." On the other hand, it is apparent that water need not be used *exclusively* for flood control for Section 702c to apply: *James* indicates that the statute encompasses waters originally stored and later diverted for purposes of flood control notwithstanding that in the interim they may have provided incidental benefits, including recreational activities such as boating.

Numerous formulations exist between those two extremes, none of which would entitle Respondent to immunity in this case, given that the irrigation water leaking from the Madera Canal has at most an exceedingly attenuated relationship to flood control activities. But if the Court elects to use this case as a vehicle to adopt a particular test, we suggest that for three reasons the proper inquiry is into whether the waters were carried in a flood control project "primarily for the purpose of flood control."

First, an inquiry into the "primary" purpose served by the waters is most consistent with Congress' intent. The text of Section 702c makes plain that Congress was principally concerned with the government's liability for naturally occurring floods and the waters that would constitute floods, as when a flood control project is used to store flood waters but is overrun and damage results downstream. An inquiry into the "primary" purpose served by waters ensures that immunity applies in such cases, even though the water may also be used for some incidental benefit such as recreation.

But the "primary purpose" standard also guards against extending the government's immunity too far, including particularly to include waters that have relatively incidental flood control benefits never considered by Congress in enacting the

Flood Control Act. Virtually every diversion of water in a federal flood control project will, by definition, have the incidental effect of reducing water levels *somewhere*, thereby potentially reducing the risk of floods. The CVP, for example, not only irrigates several million acres of land, but it also provides water for "power development, domestic and industrial consumption, navigation, waste disposal, control of salinity, enhancement of fish and wild life, [and] beautifying the out-of-doors," all of which are included in its authorized purposes. Erwin Cooper, Aqueduct Empire: A Guide to Water in California, Its Turbulent History, and Its Management Today 153, 166 (1968) (hereinafter "Cooper, Aqueduct Empire"); Central Valley Improvement Act, 102 Pub. L. 575, § 3402, 106 Stat. 4600 (1992). Friant Dam alone diverts 95% of the San Joaquin River's flow not only to irrigate approximately 1 million acres of land but also to provide a water supply for 320,000 individuals, to drive hydroelectric generators, and to maintain a trout fishery. S. Comm. on Energy and Nat. Resources, Hearings on S. 484, Central Valley Improvement Act, 102d Cong., 1st Sess. 68, 75 (1991) (Statement of Richard M. Moss, General Manager, Friant Water Users Auth.); Federal Energy Regulatory Comm'n, Office of Hydropower Licensing, Water Resources Appraisal for Hydroelectric Licensing: Middle San Joaquin Valley Basin 30, 32 (1984) (hereinafter "FERC, San Joaquin Report").[6]

On an expansive definition of "flood waters," all of these diversions would arguably trigger the government's immunity under Section 702c. As a result, innocent third parties would

[6] See also Congressional Budget Office, Water Use Conflicts in the West: Implications of Reforming the Bureau of Reclamation's Water Supply Policies 28 (1997) (explaining that the CVP is

be effectively required to subsidize the government's operation of water projects for purposes other than flood control through absorbing the costs of the government's negligence. Under the lower courts' judgment in this case, for example, Petitioner Central Green would be required to absorb costs arising from the operation of the Madera Canal (the damage to its farm caused by leaking water) that otherwise would be corrected by the federal government, which would in turn pass the costs of repairs on to the farmers who have contracted to receive water from the Canal. It seems exceedingly unlikely that Congress intended Section 702c to reach so broadly given that, as we explained above, the Flood Control Act does not use the term "flood waters" to encompass waters diverted primarily for other beneficial uses, see *supra* at 14-16 (discussing 33 U.S.C. § 702j), and Congress intended that the government would be liable for its negligence in operating flood control and irrigation facilities, see *supra* at 16-18.

Second, an inquiry into the "primary purpose" served by waters is the appropriate test under Section 702c because it has the advantage of ease of administration. As just noted, water is diverted from dams and reservoirs for all manner of activities. If Section 702c is held to confer immunity even for waters that have a relatively attenuated relationship to flood control, the lower courts will find themselves embroiled in indeterminate disputes about the degree to which those activities consume waters originally held in reservoirs to prevent flooding and therefore incidentally reduce the risk of floods. By contrast, an inquiry into the "primary purpose" served by waters, which is a standard of proof familiar to the lower courts from all manner of other contexts, presents a clear and determinate test that focuses the inquiry where it belongs: on whether the specific waters in question presented

provisions of federal law, which also turn on the presence of "flood waters." An expansive reading of "flood waters" in Section 702c presumably would apply to these other provisions as well, altering the operation of a variety of water-related programs and producing nonsensical results. A few examples illustrate this point. Under federal law, if "an agricultural structure" is repaired "to provide resistance to damage from flooding by allowing flood waters to pass through the structure," the owner is entitled to "[p]remium rates and coverage" on flood insurance, as well as "technical assistance and counseling." 42 U.S.C. § 4022(a)(2)(B). An expansive definition of "flood waters," such as one that includes irrigation waters in an irrigation canal, presumably would greatly expand the scope of this flood insurance program. Another federal statute authorizes federal assistance for damage caused by "flood waters" near the U.S./Mexican border, which on an expansive view would have to include waters even after they have been diverted to other purposes. 22 U.S.C. § 277d-12. Moreover, federal law also requires that mining operations be protected against the incursion of "flood water," a provision that under an expansive definition presumably mandates protection from leaking irrigation canals. 30 U.S.C. § 877(f). It is hard to take seriously the suggestion that Congress intended such results.

II. The Relationship Of The Waters In This Case To Flood Control Is Too Attenuated To Justify Application Of Section 702c

Under whatever formulation is ultimately adopted as the test for Section 702c immunity, the judgment in this case should be reversed. Even on the reading most charitable to Respondent, there cannot be any real dispute that a large proportion of the water that has damaged Petitioner's farm has no relationship to flood control at all. In summer months, Friant Dam does not impound any "flood waters" because there is absolutely no risk at all that the San Joaquin River will flood.

Indeed, for many months of the year, portions of the river bed of the San Joaquin River below Friant are *totally dry*. In other months, only a proportion (generally an extremely small proportion) of the waters stored behind the Dam could otherwise possibly have constituted a "flood"; a still much smaller proportion of the contents of the Madera Canal could include those waters, as opposed to waters impounded in Millerton Lake simply to store an irrigation supply. Furthermore, waters only ever fill Millerton Lake to near capacity because they are being stored by Respondent for irrigation, *not* because they must be retained to regularize the flow of the river. See generally *infra* at 25-26. But the Ninth Circuit's judgment in this case nonetheless rests on the insupportable assumption that *all* the waters that have damaged Petitioner are "flood waters."

There are, moreover, three "bright line" distinctions between the water that damaged Petitioner's farm and any "flood waters" behind Friant Dam that, as we discuss *infra*, establish that *none* of the waters in this case are sufficiently related to flood control activities to warrant the application of Section 702c. First, a federal statute and implementing regulation and water control agreement expressly distinguish between "flood control" releases of water and releases for irrigation. Second, the water at issue in this case was diverted from the Dam into a separate facility (the Canal) and for a distinct purpose other than flood control (irrigation). Third, the government recoups the expenses it incurs for the waters in question through charges to irrigation users. It therefore is not surprising that Congress and federal agencies consistently describes the Canal's contents as "irrigation water," rather than "flood waters."

Thus, because the waters that damaged Petitioner have at most an extremely attenuated relationship to federal flood control efforts, Respondent's assertion of immunity should be rejected on any fair reading of the term "flood waters." But, to the extent doubts exist, the appropriate course is to remand

the case for further factual development, given that Petitioner's complaint was dismissed on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The allegation of Petitioner's complaint that the Madera Canal "is used to convey irrigation water" directly contradicts the government's assertion that the Canal is a "flood control project" carrying "flood waters." *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 473 (1918) ("Since the case proceeded to judgment on the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true."); see also *National Metro. Bank* v. *United States*, 323 U.S. 454, 457 (1945); *Beal* v. *Missouri Pac. R.R. Co.*, 312 U.S. 45, 51 (1941); *Wilson* v. *North Carolina*, 169 U.S. 586, 594 (1898). Even if the complaint were not literally inconsistent with Respondent's factual assertions, a motion for judgment on the pleadings is resolved under the same standard as a motion to dismiss, and the complaint therefore must be "construe[d] in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (citing *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-22 (1969)); see also *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (dismissal is not permitted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). To accord weight to any factual assertions by Respondent regarding the supposed flood control functions served by the Canal would require this Court to do precisely the opposite.

A. The Federal Statute, Regulation, And Water Agreement Governing "Flood Control" Activities At Friant Dam

Pursuant to the Flood Control Act of 1944, the Army Corps of Engineers has adopted regulations that govern the "use of storage allocated for flood control" on federally owned and operated reservoirs. 33 U.S.C. § 709; 33 C.F.R. § 208.11. As required by the regulation, the Corps has entered into a "water control agreement" with the Bureau of

Reclamation, which administers Friant Dam, governing the Dam's flood control operation. See Department of the Army, Report on Reservoir Regulation for Flood Control, Friant Dam and Millerton Lake – San Joaquin River, California (rev. ed. Aug. 1980) (hereinafter, "Friant Dam Agreement"). In two respects, the regulation and agreement establish that Petitioner was not damaged by "flood waters."

First, the agreement establishes that a substantial proportion of the water that damaged Petitioner's farm has no relationship to flood control whatsoever. In particular, in the summer months when irrigation demand is the highest and water flows in the Madera Canal are the greatest, Friant Dam has no space reserved for flood control and performs no flood control releases. See Friant Dam Agreement, Chart A-11 ("flood control releases are not required"). That is not surprising: in those months, the inflows of the San Joaquin River to Millerton Lake are low, which is precisely why the Dam was created in order to impound water for irrigation. The Ninth Circuit's judgment that Petitioner cannot recover for any of the damages it has incurred (including damages caused by waters leaking from the Canal in these summer months) is therefore insupportable on any reading of Section 702c.

Second, the agreement establishes that in the limited instances in which Friant Dam *is* operated for flood control, water is released only into the river bed, not the Madera Canal. The regulation expressly distinguishes between flood control releases and "other requirements" of dams, including diversions of water for irrigation. 33 C.F.R. § 208.11(c)(5). The agreement governing Friant Dam, in turn, distinguishes "conservation operation" from "flood control operation requirements." Friant Dam Agreement at 14, A-1. In the months when "rainflood space" is set aside in Friant Dam (October to March), any water that enters that space is required to be immediately released into the river bed, *not* into the Canal. See *id.* at Chart A-11. In other months, no space

is reserved for flood control.[7] So-called "conditional space" is reserved from February to July in order to fill the reservoir by the summer months when irrigation demand is at its highest. *Id.* at A-2, Chart A-11. Even nominal "flood control" releases are conducted in this period only in order to calibrate the impoundment of the river's normal flow to meet future irrigation demand (*i.e.*, to ensure that the Dam reaches its capacity at the end of the spring) and, once again, those "flood control" releases are made only into the river bed rather than the Canal. For this reason, the Bureau of Reclamation has confirmed that Friant Dam is used for flood control only "consistent with its operations for other functions." U.S. Dep't of Interior, Bureau of Reclamation, Intermittent Surface Water Supply, Total Water Management Study for the Central Valley Basin California, Working Doc. No. 6, at 13 (1975).[8]

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[7] Nor is there any doubt at all that the waters behind the Friant Dam are segregated as distinct "irrigation waters." The Solicitor General has argued emphatically in a case involving parallel regulations under the Flood Control Act of 1944 that "flood waters" subsequently stored behind a flood control dam for purposes of irrigation are distinctly identifiable as "unutilized irrigation waters." Br. of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 16, 21, 22, 44; see also *id.* at 20, 32, 37 ("irrigation water"), 21 ("water stored but not needed for irrigation"), 22 ("water intended but not presently needed for irrigation purposes"), 25, 47 ("water stored for irrigation"). As the Solicitor General explained, "the Secretary [of Interior] defines the irrigation storage needs [and] determines the proper disposition of the resulting impounded water." *Id.* at 33.

[8] Even prior to its construction, studies established that any "flood control value of Friant reservoir could be obtained with very little, if any, impairment of its usefulness for supplying water for irrigation." State of California, Department of Public Words, Brief to the Division Engineer Regarding Report on Sacramento, San Joaquin and Kern Rivers, California 186 (Aug. 27, 1932). That is so because the greatest water volumes at the Dam "come from the melting of snow in the high mountains during the late spring and early summer. These flows are relatively predictable from measurement of the mountain snow pack, so that it is possible to allow the reservoir to fill nearly to capacity at the beginning of the irrigation season, with little danger that serious floods will spill over the dam, thus minimizing the conflict between flood control and irrigation use of the reservoir." Assembly of the State of California, Central Valley Project: Federal or State? 45-46 (1955).

B. Diversion Of Water Into A Separate "Irrigation Facility" Carrying "Irrigation Waters"

Extending Section 702c to encompass waters diverted into Madera Canal also would conflict with this Court's holding in *James* that "flood waters" are those "carried in a flood control project," 478 U.S. at 605 (emphasis added); see also *infra* part III (explaining that Ninth Circuit's judgment conflicts with *James* because Friant Dam is a "reclamation project" not a "flood control project"). The panel below recognized that the Madera Canal "is not a flood control project," Cert. App. 9a, but held that immunity applies under settled Ninth Circuit precedent because the Canal is nominally part of the CVP, which has "flood control" as one of its authorized purposes. That analysis is seriously flawed: Congress specifically included "flood control" in the authorized purposes of the CVP's "dam[s] and reservoirs" *but not its irrigation canals*. Rivers and Harbors Act of 1937, § 2, 50 Stat. 844, 850 (1937). Congress also expressly distinguished between the "Friant Reservoir" and the "irrigation facilities therefrom" in funding their construction. Emergency Relief Appropriation Act of 1936 (title II of the First Deficiency Appropriation Act, Fiscal Year 1936), Pub. L. No. 739, 74th Cong., 2d Sess., 49 Stat. 1597, 1608 (1936). In later years, the Department of Interior continued to advise Congress on the status of the Canal, and Congress continued to regard the Canal as a separate irrigation facility. Statement of Kenneth W. Markwell, Assistant Commissioner of Reclamation, Hearings on H.R. 4805, 79th Cong., 1st Sess. (1946), *reprinted in* 2 Central Valley Project Documents 20-21 (1957) (describing

Madera Canal separately as one of "the irrigation features" of the CVP, on which construction continued during World War II); Hearings on H.R. 7786, 81st Cong., 2d Sess. (1951), *reprinted in* 2 Central Valley Project Documents 34 (1957) (listing Madera Canal as one of several "Irrigation facilities"); see also U.S. Dep't of Ag., Bureau of Agricultural Economics, History of Legislation and Policy Formation of the Central Valley Project 235 (1946) (explaining that, in addressing the allocation of costs for the CVP, Congress in the Flood Control Act of 1944 expressly distinguished between dams and reservoirs that serve flood control purposes and "irrigation works" that are "necessary for irrigation purposes") (hereinafter "U.S. Dep't of Ag., CVP History").

Other sources similarly confirm that the exclusive function of the Madera Canal ever since its first operation in 1944 has been to provide water "for delivery to irrigation customers in the San Joaquin Valley." Comptroller General of the United States, Audit Report to the Congress of the United States: Central Valley, Folsom Reservoir, Kings River and Isabella Reservoir Projects in the Central Valley Basin, California 17 (1956) (hereinafter "Comptroller General, Audit Report"); see also FERC, San Joaquin Report at 30 ("The Madera Canal carries water from Millerton Lake northerly to irrigate land in Madera County."); Robert de Roos, The Thirsty Land: The Story of the Central Valley Project 8 (1948) ("The short Madera Canal wanders north from Friant to provide surface water for irrigation and restore underground water supplies between the San Joaquin and the Chowchilla River.").

The history of the Madera Canal further confirms that it is a separate irrigation facility. Citizens of the Madera region conceived of the Canal more than a century ago as a means to irrigate their crops by diverting water from the San Joaquin

River. After a number of failed attempts by local residents,[9] the federal government agreed to take over the project to create the southern hub of the CVP. Specifically, the federal government planned to build the Friant Dam to create a reservoir to store water for use in dry months and to divert the flow of the San Joaquin through the Friant-Kern Canal more than 150 miles south. Water that otherwise would have flowed in the San Joaquin's riverbed would be replaced with water diverted from the Sacramento River. The District agreed to sell the federal government the Friant site, the gravel supply, and its rights to riparian waters on the San Joaquin. In exchange, the federal government agreed to construct the Madera Canal, which would not be used to transfer water south but instead would run north from Millerton Lake for approximately 40 miles, and to provide the District with a guaranteed supply of irrigation water through the Canal.

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[9] In 1875, a civil engineer proposed creating a diversion canal at Friant, near Fresno, but the plan was not pursued. Gene Rose, San Joaquin: A River Betrayed 45-50 (1992). The Madera Irrigation District ("District") subsequently was constituted in 1888 and, although that effort failed and the District collapsed, a local "irrigation committee" later raised $25,000 to study building a dam at Friant to divert water for irrigation. Charles W. Clough, Madera: The Rich, Colorful and Exciting Historical Heritage of that Area Now Known as Madera County, California 38 (1968). Residents sought rights to water at the site from the State, and the District reconstituted itself to build the project in 1920, purchasing the land and a gravel supply, and securing a $28,000,000 bond in 1921. *Id.* Unfortunately, the District's plans to build the Dam and an irrigation canal collapsed again in 1931 (this time as a result of litigation). *Id.* Contemporaneous accounts reflect that the District represented "a real community effort to better the economic situation in the last large remaining area in the San Joaquin Valley for which a water supply could be made available from nearby sources, but of which a relatively small area was being irrigated." California Dep't of Public Works, Irrigation Districts in California, Bulletin No. 21, at 199 (1928).

Charles W. Clough, Madera: The Rich, Colorful and Exciting Historical Heritage of that Area Now Known as Madera County, California 38 (1968) (hereinafter "Clough, Madera History"). Thus, from its very inception, the Canal has operated exclusively for the purpose of irrigation.

Given that the United States both distinguishes "flood control" releases at Friant Dam from releases for irrigation and also regards the Madera Canal as a distinct "irrigation facility," it is no surprise that the government has consistently described the water in the Canal as "*irrigation water*" rather than "flood water." Respondent's consistent description of the waters in question thus confirms Petitioner's commonsense understanding that "flood waters" must change their character when held and diverted primarily for purposes other than flood control. See *supra* at 20. For example, the Secretary of Interior's initial report to the President recommending approval of funding for the CVP explained that the Madera Canal "will be capable of furnishing *irrigation water* to an area of 140,000 acres." Letter from Harold L. Ickes to President Roosevelt (Nov. 1935), *reprinted in* 1 Central Valley Project Documents: Authorizing Documents 565 (1956) (emphasis added). The Department of Interior's 1945 "Comprehensive Plan" for water development is to the same effect. U.S. Dep't of Interior, Bureau of Reclamation, Comprehensive Plan for Water Resources Development 174 (1945) ("Madera Canal diverts northerly from Millerton Lake to furnish a supplemental and new irrigation supply to lands in Madera Irrigation District. * * * It is in partial operation, furnishing *irrigation water* through existing canals and natural channels and by replenishing ground-water supplies." (emphasis added)). And the Department of the Interior subsequently advised Congress that as of 1949 the Canal was "in partial operation, furnishing *irrigation water* through existing canals and natural channels and by replenishing ground-water supplies." U.S. Dep't of Interior, Central Valley Basin, Our Rivers: Total Use for Greater Wealth, Sen. Doc. No. 113, 81st Cong., 1st Sess. 214 (1949) (emphasis added); see also U.S.

Dep't of Interior, Bureau of Reclamation, Central Valley Project: 1950 Annual Report 11 (1950) ("This important unit of the Central Valley Project delivers 1,000 cubic feet of water per second to its service area in Madera County, and during 1950 alone, delivered more than 116,000 acre-feet of *irrigation water*." (emphasis added)).

C. Recoupment Of Costs For Irrigation

Holding that the "irrigation water" at issue in this case constituted "flood waters" would also be contrary to Congress' intent in enacting Section 702c. This Court confirmed in *James* that Congress' rationale in immunizing the government for damage "from or by floods or flood waters" was ensuring that the expenditures required for the plan's flood control efforts, which the federal government would not recoup, would not also thereby expose the government to further liability. 478 U.S. at 607. Applied to the Friant Dam, that rationale makes sense, if at all, only with respect to flood control releases into the river bed, for which the federal government does not recoup its costs.

By contrast, the construction and operation of the Dam and Canal for the purpose of irrigation do not implicate Congress' intent in enacting the immunity provision because the government recoups the costs of such activities through charges to irrigation users. Respondent provides the water in the Madera Canal to irrigation users pursuant to a binding contractual arrangement under which users of the water reimburse the government for its costs. E.g., Br. of U.S., No. 86-939, *ETSI Pipeline Project* v. *Missouri* 7 n.9 ("As in any Bureau reclamation project, irrigators and power users would be expected to repay the project costs assignable to irrigation and power production."); see also *id.* at 43 ("Thus, irrigators are required to repay that portion of * * * construction costs allocable to irrigation, including the cost of providing irrigation storage and the cost of providing power for irrigation, that is within their power to repay."). The federal government's cost allocation methodology mandates that "[s]eparable costs of

multiple-purpose units are computed to the extent that it is reasonable to do so and that reliable data are available; they are then deducted from total project cost in order to arrive at joint costs which must be allocated by other means." Assembly of the State of California, Central Valley Project: Federal or State? 79 (1955). For the Friant division, "the Friant-Kern and Madera Canals are used only for irrigation, and are accordingly charged to irrigation costs." *Id.* As a result, to hold that Respondent is immune in this case would only serve to require Petitioner to subsidize the provision of water to the irrigators that use the Canal. Nothing suggests that Congress contemplated such a remarkable result.

Of note, Congress clearly distinguished construction under the Flood Control Act from reclamation developments such as the Madera Canal that would distribute irrigation waters. To nonetheless hold that the government is immune for reclamation activities flies directly in the face of congressional intent. The Act's supporters thus expressed the view that "reclamation" which resulted from the flood control projects created under the Act would be "*purely incidental*." 69 Cong. Rec. 8193 (May 9, 1928) (statement of Sen. George) (emphasis added); see also *id.* ("*Wholly incidental* is the benefit that flows to landowners and property owners along the Mississippi." (emphasis added)). Proponents were emphatic that "there is no similarity between flood control and reclamation. The very opposite obtains. The dissimilarity suggests a contrast rather than a comparison." 69 Cong. Rec. 6652 (Apr. 17, 1928) (statement of Rep. Whittington); see also *id.* at 8193 (May 9, 1928) (statement of Sen. George) ("I do not regard flood control on the Mississippi River as standing upon the same basis or being in anywise analogous to reclamation. The two seem to me to be wholly apart."); H.R. Rep. No. 300, 63 Cong., 2d Sess., pt. II, at 70, *quoted in* H.R. Rep No. 1072, 70th Cong., 1st Sess. 158 (1928) (explaining that the Act was "not a question of reclamation; that is to say, the advocates of Federal control of these floods are not asking that Congress appropriate any money for the rec-

lamation of these overflowed lands. * * * It is a mistake, then, to assume that Congress is being asked to engage in any reclamation work.").

III. Petitioner Was Not Damaged By Water Carried In A "Flood Control Project"

The judgment below should also be reversed because, although the Ninth Circuit correctly recognized that *James* limits Section 702c to waters carried in a "flood control project," it erred in holding that the waters in this case satisfied that standard. The court of appeals' holding rests on two premises, both of which conflict with this Court's decision in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), and either of which justifies reversal. First, the Ninth Circuit held that Central Valley Project is a "flood control project" because its authorized purposes include flood control. Second, the court of appeals held that every component of the CVP, including Friant Dam, is by definition also a "flood control project." In reality, notwithstanding its incidental operation for flood control, the Friant Dam is a "reclamation project" separate and distinct from other components of the CVP that are "flood control projects." The water impounded by the Dam thus is not subject to Section 702c.

A. "Flood Control" Projects Are Distinct From "Reclamation Projects" For Purposes Of Section 702c

The Ninth Circuit assumed, without explanation, that every facility which is part of a larger project that, in turn, includes "flood control" in its authorized purposes is itself a "flood control project" for purposes of the Flood Control Act. In reality, since the late 1800s, Congress has employed the phrase "flood control project" in various Flood Control Acts (including the 1928 Act at issue here) as a term of art referring to facilities constructed and operated by the Army Corps of Engineers for the principal purpose of "flood control." E.g., Water Resources Development Act of 1999, 106 Pub. L.

53, 113 Stat. 269 (1999) (listing numerous "flood control projects"). "Flood control projects" are thus distinct from "irrigation" and "reclamation" projects. For example, the Chapter of the U.S. Code relating to reclamation and irrigation (Title 43, Chapter 12) instructs federal agencies to cooperate with state and local governments regarding water projects, distinguishing between "Federal navigation, flood control, irrigation, or multiple purpose projects." 43 U.S.C. § 390b(b). Indeed, the statute contemplates that although *any* of those types of projects may include "reservoir projects," and even costs "allocated to flood control," *id.* § 485h(b), each project is not thereby converted into a "flood control project." Congress has also authorized funding for the repair "of any flood control work threatened or destroyed by flood," 33 U.S.C. § 701n(a)(1), which the Army Corps of Engineers construes to *exclude* "[s]tructures built primarily for the purpose of channel alignment, navigation, recreation, fish and wildlife enhancement, *land reclamation*, drainage, or erosion protection," 33 C.F.R. § 203.42(a) (emphasis added).[10]

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[10] See also, e.g., 7 U.S.C. § 1860(b) (restricting crop loans and farm payments regarding "contracts entered into with respect to Federal irrigation, drainage, or flood-control projects"); 15 U.S.C. § 205c(9)(C) (distinguishing measurements to be used with respect to "any Federal building or construction project * * * on or used in connection with river, harbor, flood control, reclamation, or power projects"); 16 U.S.C. § 3952(d) (requiring consistency "in implementing, maintaining, modifying, or rehabilitating navigation, flood control or irrigation projects" as they relate to Louisiana wetlands); 7 C.F.R. § 12.31(c) (excluding from the definition of "artificial wetlands" those "created in order to mitigate the loss of other wetlands as a result of irrigation, recreation, municipal water, flood control, or other similar projects"); 29 C.F.R. § 9.4(9)(b)(2)(iv) (excluding from executive order regarding "public buildings," buildings "[o]n or used in connection with river, harbor, flood control, reclamation, or power projects").

In particular, reclamation projects are constructed by the Bureau of Reclamation and are subject to a distinct legal regime under which the waters they divert may be used only on farms no larger than 160 acres, see generally *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), and the costs of their irrigation and power features must be recouped through charges to users, see *supra* at 31-32. Flood control projects, by contrast, are constructed and generally administered by the Army Corps of Engineers and are not subject to such restrictions. "Under the water-service contracts the Bureau of Reclamation is a wholesaler of water. The Bureau constructs the facilities and contracts with a water users organization (or in some instances, individual water users) for delivery of water at rates which will probably repay the operation and maintenance costs, including replacements during the repayment period, and the share of the construction costs to be repaid by the water users." Comptroller General, Audit Report at 40. By contrast, "[i]n providing for flood control at a reservoir project of the Corps of Engineers, no direct assessment is made against the beneficiaries for the flood control operations." *Id.* at 37.

B. The Decision Below Conflicts With This Court's Holding In *United States* v. *Gerlach Live Stock Co.* That The Friant Dam Is A Reclamation Project, Not A Flood Control Project

As we explained above, Congress embraced the distinction between reclamation projects and flood control projects in enacting the Flood Control Act. See *supra* at 32-33. In particular, Congress emphasized that projects constructed under the Act were wholly distinct from reclamation facilities. Friant Dam, however, *is* a reclamation project constructed and operated by the Bureau of Reclamation, as this Court squarely held in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), which involved the federal government's obligation to pay landowners downstream from the Friant Dam the value of their riparian rights to water impounded by the Dam. The

district court held that the Dam was a reclamation project and that the United States was therefore required to pay for the water rights under the terms of federal reclamation law. In this Court, the federal government sought to avoid paying on the basis of its "navigation servitude." But because the Dam impounded the San Joaquin and thereby *eliminated* navigation, the government was reduced to relying principally on the Dam's supposed relationship to flood control, which the government asserted bore a sufficient nexus to navigation.

The Solicitor General argued in *Gerlach* that the Dam was a flood control project because (i) "the Friant Dam was designed to prevent floods in the San Joaquin Valley," such that a certain portion of Millerton Lake's capacity was reserved for flood control and water was released into the river bed to keep the Lake from overflowing "at the expense of possible irrigation uses," and (ii) as a legal matter, "the fact that flood control is joined with other purposes does not strip the project of its flood control character." Br. for U.S., O.T. 1948, No. 4, *United States* v. *Gerlach Live Stock Co.* 36 (hereinafter, "*Gerlach* Opening Br."); Reply Br. for United States, *id.*, at 13 (hereinafter, "*Gerlach* Reply Br."). The Solicitor General also contended that Congress' authorization of the CVP for "flood control" properly was imputed to the Dam, maintaining that (i) the fact that the CVP's authorized purposes included flood control rendered the Dam a flood control project because "Congress established the Central Valley Project as an integral whole" and the district court therefore "should not have segregated what Congress quite properly treated as a unit," and (ii) Congress had stated expressly in one of the CVP's authorizing statutes that flood control took priority over other functions. *Gerlach* Opening Br. at 26; *Gerlach* Reply Br. at 13; see also *Gerlach* Opening Br. at 30 ("So here, the Friant Dam was not an isolated structure, but was an integral part of the entire Central Valley Project."), 34 ("Congress was amply justified in so treating the project as an entity, and hence, the court below was not warranted in isolating Friant Dam from the entire project.").

This Court rejected the Solicitor General's arguments and affirmed the district court's determination that Friant Dam is a "reclamation project," notwithstanding the Dam's limited flood control features and notwithstanding that other components of the CVP are "flood control projects." The Court did not doubt that in "a plan so comprehensive [as the CVP] * * * particular components may be described without pretense as * * * flood control projects," 339 U.S. at 736, but it squarely concluded that the Friant Dam is *not* such a project. Justice Jackson's opinion for the Court explained that President Roosevelt originally had authorized "funds for construction of Friant Dam and canals" "in accordance with the reclamation laws," and that the Secretary of Interior had made the required finding of feasibility for the project under the reclamation laws. *Id.* at 732. Congress, in turn, "reauthorized" the project as "already initiated by President Roosevelt," and expressly "provided that 'the provisions of the reclamation law'" would govern construction of, *inter alia*, "'dams'" and "'canals.'" *Id.* at 732-33. Congress specifically deferred to the view of the Bureau of Reclamation, which was charged with constructing and administering the CVP: "From the beginning, it has acted on the assumption that its Friant undertaking was a reclamation project. *Even a casual inspection of its committee hearings and reports leaves no doubt that Congress was familiar with and approved this interpretation.*" *Id.* at 739-40 (emphasis added). The Court found its conclusion that the Dam was a reclamation project inescapable, given that the "project has been regarded by the highest Executive authorities as a reclamation project, and has been carried as such from its initiation to final payment * * * , and Congress, knowing its history, has given the approvals it has." *Id.* at 742.

This Court also rejected the argument that Congress, by broadly authorizing the CVP for flood control purposes, intended to convert each separate component of the CVP into a flood control project. Instead, "Congress' general direction of purpose we think was intended to help meet any objection to

its constitutional power to undertake this big bundle of big projects." *Id.* at 737-38. It was open to question at the time Congress authorized construction of the CVP whether the federal government had the power to create an intra-state reclamation project for the benefit of nonfederal lands. *Id.* at 732. Efforts to enhance "navigation" and "reduce floods," however, were within federal authority under settled precedents. *Id.* Thus, the broad statement of the CVP's purpose "was in justification of federal action on the whole, not for effect on private rights at every location along *each component project*." *Id.* at 738 (emphasis added).[11]

The Court in *Gerlach* finally took pains to reject the government's related argument that the CVP as a practical matter operates as an "integrated whole," such that its supposed flood control functions elsewhere in the Central Valley should be imputed to the Friant Dam:

> The Central Valley basin development envisions, in one sense, an integrated undertaking, but also an aggregate of many subsidiary projects, *each of which is of first magnitude*. It consists of thirty-eight major dams and reservoirs bordering the valley floor and scores of smaller ones in headwaters. It contemplates twenty-

[11] See also Senate of the State of California, Feasibility of State Ownership and Operation of the Central Valley Project of California 101 (1952) (explaining that broad statement of purpose was necessitated by the holding of *United States* v. *Arizona*, 295 U.S. 174 (1935), that the Bureau of Reclamation's construction of Parker Dam had not been authorized by Congress, as well as "the further objection that the primary objective of federal reclamation law being to dispose of the public domain, its constitutional sanction rested on the property clause of the U.S. Constitution. In the [CVP] project service area, however, there were no public lands to reclaim."); U.S. Dep't of Ag., CVP History at 2 ("Some doubts had been raised as to the legality of a Federal reclamation project in an area irrigated from a wholly intra-state stream and in which there was no federal land."); *id.* at 82 (same).

> eight hydropower generating stations. It includes hundreds of miles of main canals, thousands of miles of laterals and drains, electric transmission and feeder lines and substations, and a vast network of structures for the control and use of water on two million acres of land already irrigated, three million acres of land to be newly irrigated, 360,000 acres in the delta needing protection from intrusions of salt water, and for municipal and miscellaneous purposes including cities, towns, duck clubs and game refuges. These projects are not only widely separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years.

Id. at 733 (emphasis added); see also Congressional Budget Office, Water Use Conflicts in the West: Implications of Reforming the Bureau of Reclamation's Water Supply Policies 31 (1997) (explaining that because Friant Dam exclusively impounds the San Joaquin River and does not receive water transferred from the Sacramento River, it "is not directly linked to other CVP units").

It is not necessary to dwell on the obvious, total, and remarkable conflict between *Gerlach* and the Ninth Circuit's holding that Respondent is entitled to immunity because the CVP "has flood control as one of its congressionally authorized purposes" and operates as an "integrated whole." See *supra* at 3. The Solicitor General unsuccessfully made the identical arguments regarding the identical facility in *Gerlach*. *Gerlach*'s holding rejecting those arguments is in two respects fully applicable to the determination whether the federal government is entitled to immunity under the Flood Control Act. First, *Gerlach* settles conclusively that Congress, accepting the representations of the Department of Interior, regarded the Friant Dam as a reclamation project, *not* a flood control project. By contrast, in enacting the Flood

Control Act, Congress was concerned only with "flood control projects designed to carry floodwaters." *James*, 478 U.S. at 605. Particularly given that the Department of Interior sought funding for the Dam in the early 1930s, only a few years after the Flood Control Act was enacted, there simply is no basis to conclude that Congress conceived of it as a "flood control project."

Second, *Gerlach* settles that each component of the CVP, such as the Friant Dam or the Madera Canal, is a separate project with its own purposes. Different components of the CVP were constructed at different times, with different types of congressional authorizations, and for different purposes; the CVP thus is "an aggregate of many subsidiary projects, *each of which is of first magnitude*." 339 U.S. at 733 (emphasis added). In particular, the Court in *Gerlach* did not doubt that individual components of the CVP could be deemed "flood control projects," *id.* at 736 – Friant Dam simply was not one of them. See also Senate of the State of California, Feasibility of State Ownership and Operation of the Central Valley Project of California 102 (1952) ("It also appears evident from the [*Gerlach*] opinion that the designation 'reclamation project' applies not only to Friant Dam but to the entire project of which Friant Dam and related irrigation facilities is an integral part.").

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 99-859

In the Supreme Court of the United States

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action arising from property damage sustained as a result of allegedly negligent construction and maintenance of an irrigation canal that is part of a multi-purpose federal flood control project.

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In the Supreme Court of the United States

No. 99-859

CENTRAL GREEN CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 177 F.3d 834. The opinion of the district court (Pet. App. 10-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1999. A petition for rehearing was denied on September 7, 1999 (Pet. App. 21). The petition for a writ of certiorari was filed on November 19, 1999, and was granted on March 20, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

33 U.S.C. 702c, in pertinent part, is in App., *infra*, 1a.

STATEMENT

The Flood Control Act of 1928, 33 U.S.C. 702c, provides that "[n]o liability of any kind shall attach to or rest upon the

United States for any damage from or by floods or flood waters at any place." Petitioner claims that the waters that damaged its property—allegedly the result of a leak from the Madera Canal in the Friant Division of California's Central Valley Project (CVP)—were irrigation waters and not flood waters, and that the court of appeals used the wrong test to determine that they were flood waters. To place this issue in context, it is necessary to understand the interrelated history of irrigation and flood control in California's Central Valley, the purposes and operations of the CVP and its Friant Division, and the relationship of the Madera Canal to both irrigation and flood control.

1. *History of Flooding in the Central Valley.* The Central Valley consists of the basins of the Sacramento River in the north and the San Joaquin River in the south. Bordered on the east by the Sierra Nevada Mountains and on the west by the Coast Range, the valley extends almost 500 miles and includes more than one third of the State. The two rivers flow toward each other and join in the Sacramento-San Joaquin delta, eventually emptying into San Francisco Bay and, from there, into the Pacific Ocean. S. Doc. No. 113, 81st Cong., 1st Sess. 83 (1949) (S. Doc. No. 113).

Efforts to address the problem of flooding in the Central Valley began as early as 1880. See *Report of the State Engineer To The Legislature of California—Session of 1880*, Pt. II, at 5 (1880). California's State Engineer reported that the low lands of the Sacramento and San Joaquin valleys "have been and still in a great measure are subject to annual inundation." *Ibid.* According to the State Engineer, the Sacramento River "brings down a formidable flood volume almost every year, inundates a large area of country, and seriously threatens with devastation several hundred thousands of acres." *Ibid.* The San Joaquin was "in correspondingly high flood" approximately once every four years. *Ibid.* Periodic flooding in the winter contrasted with generally inadequate sustained rainfall during the summer,

making "the use of irrigation imperative for production of most agricultural crops." S. Doc. No. 113, at 85.

Beginning early in the 20th century, California actively pursued a coordinated approach to flooding and water shortages. In 1915, the state legislature authorized the convening of a conference "[f]or the purpose of considering and recommending a unified state policy with reference to irrigation, reclamation, water storage, flood control, municipalities, and drainage, with due regard to the needs of water power, mining, and navigation." H.R. Doc. No. 416, 84th Cong., 2d Sess. Pt. 1, at 109 (1956) (H.R. Doc. 416).[1] The following year, the State Water Problems Conference issued its report. Even at that early planning stage, the Conference recognized that the use of dams and their resulting reservoirs for both flood control and irrigation involved a careful balancing of "antagonistic interests." *Id.* at 128. The report explained that "[a] reservoir for highest economic efficiency in flood control should be kept empty until actual flood" and then gradually emptied "to give storage for another flood. That same reservoir, if used for power or irrigation would, on the contrary, be filled as soon as possible—before actual flood if conditions permitted—and kept full, lest there should not be subsequent flood to fill it." *Id.* at 129.

2. *Early Federal Involvement in Central Valley Flood Control.* In 1893, Congress established the California Debris Commission, a panel of three Army engineers appointed by the President. Congress directed the Commission to adopt plans to address flooding and navigation problems caused by tailings from hydraulic mining that had clogged the channels of the Sacramento and San Joaquin Rivers. Caminetti Act,

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[1] This document is a compilation of state and federal materials pertaining to the Central Valley Project. For ease of reference, we cite this document rather than the original sources.

ch. 183, 27 Stat. 507; see also H.R. Doc. 416, at 50.[2] In 1917, Congress authorized the Secretary of War to carry out the Commission's plans to control floods on the Sacramento River. Act of Mar. 1, 1917, ch. 144, § 2, 39 Stat. 949. That Act authorized expenditure of $45 million for flood control work on the Mississippi River, conditioned upon contributions of at least half that amount from "local interests protected thereby." § 1, 39 Stat. 948. Congress continued to link flood control in the Central Valley and along the Mississippi in the Flood Control Act of 1928, Act of May 15, 1928, ch. 569, § 1, 45 Stat. 534-535, which contains the immunity provision at issue in this case (§ 3, 45 Stat. 535-536). That Act increased the authorized federal expenditures for flood control on the Sacramento River to a total of $17.6 million (§ 13, 45 Stat. 539).

3. *Construction of the Central Valley Project and Friant Dam.* As the federal government was making its first investments in flood control on the Sacramento River, California was investigating a coordinated approach to water problems, including flood control, throughout the Central Valley. See H.R. Doc. 416, at 139-256. Those investigations culminated in 1931 in a State Water Plan submitted to the California legislature by the State's Director of Public Works. *Id.* at 257. That plan addressed California's "two-fold" water problem, "involving first the conservation and utilization of its water resources, and second, the control of floods." *Id.* at 258-259. The plan called for a system of dams, reservoirs, and canals in the Central Valley that would, among other functions, pump water from the Sacramento-San Joaquin delta into the San Joaquin basin, at Mendota, for irrigation. That system would permit the waters of the San

[2] The Commission was abolished in 1986 and its functions transferred to the Secretary of the Army. Water Resources Development Act of 1986, Pub. L. No. 99-662, Tit. XI, § 1106, 100 Stat. 4229.

Joaquin to be diverted from farther upstream, at Friant, to irrigate previously arid upstream lands. *Id.* at 261.

The 1931 State Water Plan specifically called for construction of Friant reservoir, as well as the Madera and Friant-Kern Canals to be fed by that reservoir. H.R. Doc. 416, at 271-272. Moreover, the plan proposed "[t]he reservation of space and its operation for flood control * * * in each of the major reservoirs on the more important streams." *Id.* at 295. The plan further specified the quantity of storage space to be reserved for flood control in each of 14 proposed reservoirs, including Friant, and explained that "operation of these reservoirs for flood control would not materially impair their value for conservation purposes, nor materially decrease the amount of value of the electric energy generated by water released from them." *Id.* at 295. Operating the reservoirs "specifically for flood control * * * would result in a substantial reduction of floods and in an increased degree of protection to the areas subject to overflow." *Id.* at 297.[3]

[3] The Senate Committee on Irrigation and Reclamation recognized that California's water plan as a whole, and Friant reservoir in particular, would serve an important flood control function. In a 1933 report, the Committee stated: "One of the important proposed objectives of the great central valley project of California is the provision of additional flood protection on the Sacramento and San Joaquin Rivers by the regulation of floods in the two proposed major storage reservoirs, Kennett Reservoir on the Sacramento River and Friant Reservoir on the San Joaquin River." H.R. Doc. 416, at 500. The Committee compared the problem of flooding on the Sacramento and San Joaquin Rivers "to that on the Mississippi river." *Id.* at 499. It recognized that "[a]lthough of smaller magnitude than that on the Mississippi River, the problem [of flood control on the Sacramento and San Joaquin] is even more intensive, involving maximum flood flows ten times as great per unit of drainage area than the maximum flood flow of the Mississippi below Cairo or Arkansas City." *Ibid.* The Committee thus predicted that the Kennett and Friant reservoirs "can be operated to materially decrease the flood flows and will, therefore, greatly lessen the frequency of floods and possible damage resulting therefrom." *Ibid.*

In 1933, the California legislature authorized construction of a coordinated water project along the lines of the State Water Plan. That planned "Central Valley Project," which included both Friant Dam and the Madera Canal, was to be financed by the sale of revenue bonds. H.R. Doc. 416, at 412, 423. Almost from the beginning, however, state financing appeared infeasible and federal involvement became essential to the project's realization. *Id.* at 522. In 1935, the State legislature acknowledged those facts and authorized the State's Department of Public Works "to prosecute efforts to secure Federal aid and assistance in financing the construction of the Central Valley project." *Id.* at 555.

In the ensuing years, the federal government acted to advance construction of the CVP and, ultimately, to make it an entirely federal project. In 1935, Congress authorized the Army Corps of Engineers to undertake construction of Kennett Dam (now called Shasta Dam) on the Sacramento River, one of the major components of the coordinated project that was initially planned and authorized by the State. Rivers and Harbors Act of 1935, ch. 831, 49 Stat. 1038; see also H.R. Doc. 416, at 544-555. Also in 1935, the President approved a report by the Secretary of the Interior on the feasibility of the entire Central Valley Project as a reclamation project pursuant to federal reclamation laws. H.R. Doc. 416, at 562-567.[4] As described in that report, the CVP included among its principal features Kennett Reservoir on the Sacramento River, pumping plants and canals to deliver water from the Sacramento-San Joaquin delta to Mendota, Friant Reservoir on the San Joaquin

[4] Under the Act of June 25, 1910, ch. 407, § 4, 36 Stat. 836, no reclamation project could be undertaken unless recommended by the Secretary of the Interior and approved by the President. Similarly, under the Act of Dec. 5, 1924, ch. 4, § 4(B), 43 Stat. 702, no reclamation project could be approved for construction until the Secretary of the Interior made a written finding that the project was feasible and that its cost was likely to be repaid to the United States.

River, and the Madera and Friant-Kern Canals to be fed by the Friant reservoir. *Id.* at 564-565. In 1936, Congress appropriated funds specifically for "construction of Friant Reservoir and irrigation facilities therefrom." Act of June 22, 1936, ch. 689, 49 Stat. 1622.

Finally, in 1937, Congress transferred responsibility for construction of the CVP from the Corps of Engineers to the Secretary of the Interior. Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850. The same statute provided that:

> the entire Central Valley project * * * is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes.

Ibid. Congress also specified that the project's dams and reservoirs "shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." *Ibid.*

Construction of Friant Dam began in October 1939 and the dam was in partial operation by November 1942. U.S. Army Corps of Engineers, *Report on Reservoir Regulation for Flood Control, Friant Dam and Millerton Lake, San Joaquin River, California* 2 (Dec. 1965, rev. Aug. 1980) (*Friant Flood Report*) (lodged with the Clerk). Much of the remaining construction work on the dam and related features of the project was deferred during the Second World War (*ibid.*), but by February 1947, the dam itself was "largely constructed," the Madera Canal was "essentially

complete," and construction of the Friant-Kern Canal was underway. H.R. Doc. No. 146, 80th Cong., 1st Sess. 2 (1947). Friant Dam and its reservoir, named Millerton Lake, were completed in 1949. U.S. Army Corps of Engineers, *Post-Flood Assessment for 1983, 1986, 1995, and 1997, Central Valley, California* 3-32 (1999) (*Post-Flood Assessment*).[5]

Congress confirmed the flood control role of Friant Dam while it was still under construction. In the Flood Control Act of 1944, ch. 665, 58 Stat. 887, Congress centralized responsibility for flood control operations at federal reservoirs by directing the Secretary of War to prescribe regulations governing such operations at "all reservoirs constructed wholly or in part with Federal funds provided on the basis of [flood control or navigation] purposes." § 7, 58 Stat. 890. The House report on the 1944 Act described the "widespread and damaging floods [that had] occurred in several of the major river basins of the Nation" in 1942 and 1943, with particular emphasis on floods in "the lower San Joaquin Valley." H.R. Rep. No. 1309, 78th Cong., 2d Sess. 1, 2 (1944) (H.R. Rep. No. 1309). That report further stated that recent experience "in the operation of multiple-purpose reservoirs during major floods has demonstrated that * * * reservoirs constructed wholly or in part with federal funds * * * should have their flood-control features operated under the supervision of the Chief of Engineers in accordance with regulations prescribed by the Secretary of

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[5] In 1997, California experienced "one of the largest and most extensive flood disasters in the State's history." *Post-Flood Assessment*, at ES-1. The House Report on the bill ultimately enacted as the Energy and Water Development Appropriations Act, 1998, Pub. L. No. 105-62, 111 Stat. 1320, states that, "[i]n response to the devastating floods of 1997, the Committee has added funds and directs the Corps of Engineers to conduct * * * a comprehensive post-flood assessment for the California Central Valley (Sacramento River Basin and San Joaquin River Basin)." H.R. Rep. No. 190, 105th Cong., 1st Sess. 24 (1997). The *Post-Flood Assessment* report responded to that directive.

War." *Id.* at 7. In addition, however, the 1944 Act expressly approved the plan "for flood control and other purposes on the Lower San Joaquin River and tributaries * * * in accordance with the recommendations of the Chief of Engineers" and authorized $8 million for "initiation and partial accomplishment of the plan." § 10, 58 Stat. 901.

4. *Operation of Friant Dam and the Madera Canal.* Friant Dam, located 25 miles northeast of Fresno, is a concrete structure that can store 520,500 acre-feet of water. *Friant Flood Report* 11. Water is released from the dam into the Madera and Friant-Kern Canals as well as down the river either through outlets in the dam or over its spillway. *Id.* at 15. The 36-mile long Madera Canal extends northward from the dam, crossing the Fresno River and emptying into the Chowchilla River. *Id.* at 11; see App., *infra*, at 2a (diagram depicting Central Valley Project). Approximately the first 7.7 miles of the canal, including the portion that traverses petitioner's property, is lined by concrete, with the remainder unlined and formed by dug-out clay and rock. The Friant-Kern Canal extends 152 miles southward from the dam and connects to the Kern River. *Friant Flood Report* 11; *Post-Flood Assessment* 3-32.

Friant Dam is owned by the United States and operated by the Department of the Interior as part of the CVP. *Post-Flood Assessment* 3-32. The Madera Canal, likewise part of the CVP (see S. Doc. No. 113, at 130), is owned by the United States (through the Department of the Interior) and operated by the Madera Irrigation District (and its legal successor) under contract with and supervision of the Department. J.A. 8, 19-47. The Department's Bureau of Reclamation controls irrigation operations in all parts of the CVP, including the Friant Division. *Friant Flood Report* App. A.

Pursuant to the Flood Control Act of 1944, however, the Friant Division's flood control operations are regulated by the Corps of Engineers. 33 C.F.R. 208.11. In 1955, the Corps first promulgated regulations governing "the use and

operation of Friant Dam and Reservoir on San Joaquin River, California, for flood control purposes." 20 Fed. Reg. 9181. In 1976, the Corps replaced the regulations specifically addressing Friant Dam, and similar regulations for other individual reservoirs, with new regulations governing the operation of all projects covered by the 1944 Act or otherwise subject to the Corps' authority to direct flood control operations, other than those owned and operated by the Corps itself. 41 Fed. Reg. 20,400 (1976).

Under those regulations (which list covered projects, including "Friant Dam and Millerton Lake," by name), each project's flood control operations are governed by a "water control plan and manual" prepared by the Corps of Engineers specifically for that project. 33 C.F.R. 208.11(d)(4). The project owner commits to the terms of the plan and manual in a "letter of understanding" or a "field working agreement" with the Corps. 33 C.F.R. 208.11(c)(3). See *Friant Flood Report* App. A. The Corps' plan for the Friant Division is designed to address two kinds of floods that occur in the Central Valley—floods caused by rain and floods caused by melting snow. Rainfloods, which typically occur in late fall and winter, are characterized by high peak discharges lasting only a few days at a time. Notwithstanding their short duration, such rains historically have flooded natural river channels unimproved by man-made levees and dams. In contrast, snow-melt floods, which occur during the late spring and summer, produce sustained, moderate flows over a period of two to three months and result in a much larger volume of total runoff. *Id.* at 9-10. Those runoffs require extensive monitoring to ensure against flooding.

The plans in effect pursuant to 33 C.F.R. 208.11 for flood control operations of Friant Dam and its related canals address both rain and snow-melt floods. Regulations require each project to have a "Flood Control Diagram" describing the multiple uses of storage space behind the dam over the course of the year. 33 C.F.R. 208.11(d)(5)(i). The Friant

diagram shows that for ten months of the year (October through July), the reservoir stores water both to serve irrigation needs and to control floods. *Friant Flood Report* App. A, Chart A-11. "The flood control operation is determined daily as described on chart A-11." *Id.* at A-2. The Flood Control Diagram also shows that during some portions of the year, depending on the weather, the total quantity of stored water necessary to satisfy irrigation needs *and* to control floods may exceed the storage capacity of the dam. *Id.* Chart A-11. At those times, "supplemental releases"—releases solely for flood control—are mandatory. *Ibid.* Some of those flood releases are made through the Madera and Friant-Kern Canals. *Post-Flood Assessment* 3-32 to 3-33.[6] The Corps of Engineers has estimated that operation of Friant Dam reduced flood damage by $23,690,000 in 1983, $33,190,000 in 1986, $54,310,000 in 1995, and $3,320,000 in 1997. *Id.* at 5-15, 5-27, 5-38, 5-48.

5. *This Litigation.* Petitioner Central Green Company, the owner of pistachio orchards in Madera County, California, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that negligent design, construction, or maintenance of the Madera Canal by the federal government resulted in property-damaging leakage of water from the canal. Pet.

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[6] Operation of the Friant Division to serve the functions of flood control and irrigation requires extensive weather forecasting efforts by federal and state agencies. *Friant Flood Report* 16. Accurate predictions of water runoff historically have been difficult to make consistently. Between 1953 and 1978, for example, the error rate varied greatly, with underestimates and overestimates of the forecasted runoff into Millerton Lake routinely as great as 100 percent of the actual runoff. See *id.* Chart A-9. Given those large discrepancies, which by no means have been limited to those years, the task of managing the water level at Friant Dam requires great flexibility and the need to make frequent, often daily adjustments to the amount of water released.

App. 2; J.A. 8-9.[7] The district court granted the government's motion for judgment on the pleadings. Pet. App. 20. Rejecting petitioner's contention that the Flood Control Act of 1928, 33 U.S.C. 702c *et seq.*, did not apply because the waters carried through the Madera Canal are used for irrigation purposes and not for flood control, the district court observed that "[t]he legislative history [of Section 702c] * * * is very clear that the scope of the immunity is very broad." Pet. App. 19. The district court concluded that petitioner had "cited nothing that allows the undermining of the scope of that immunity when a multi-purpose project is involved." *Id.* at 19-20.

The court of appeals affirmed. Pet. App. 1-9. The court recognized that Section 702c "confers broad immunity for claims arising from the design, operation, or management of federally authorized flood control projects." *Id.* at 2. Petitioner's "sole argument" against application of the immunity here, according to the court, was that the water that damaged its property was not "flood water" within the meaning of Section 702c because it was held "for irrigation purposes rather than flood control." *Id.* at 3. The court concluded that its own decisions, both before and after this Court's decision in *United States* v. *James*, 478 U.S. 597 (1986), compelled rejection of that argument because the Madera Canal is part of a federal flood control project, the CVP. Pet. App. 5-8.

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[7] Although for purposes of the motion for judgment on the pleadings the allegations of the complaint must be accepted as true, the government denies that leakage from the canal has caused harm to petitioners. See J.A. 58. At times when the canal is completely dry, petitioner's land has been flooded, which suggests that the problem in fact stems not from leakage from the canal but from subterranean ground water or over-irrigation by petitioner from the water it obtains from the San Joaquin River.

SUMMARY OF ARGUMENT

I. In *United States* v. *James*, 478 U.S. 597 (1986), this Court construed the Flood Control Act of 1928 to confer broad immunity from suit against the United States for damages by flood waters, which the Court defined as "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Id.* at 605. That definition is satisfied in this case.

II. In several statutes, Congress expressly provided that the entire Central Valley Project (CVP) is a flood control project. Both as it was originally conceived by Congress and as it operates in practice, the CVP's flood control functions depend on the integrated operations of the project's numerous subdivisions, which include Friant Dam and the Madera Canal. The timing and amount of water releases at each place in the CVP have consequences for flood control. Moreover, Congress also specified in the Flood Control Act of 1944 that the Friant Division (of which the Madera Canal is a part) is a flood control project by incorporating into the legislation a set of Corps of Engineers' recommendations that clarified the important flood control purpose of the Friant Dam and the use of the Madera Canal for releases of flood waters.

The 1944 Act also conferred legislative rulemaking authority on the Corps of Engineers to promulgate flood control rules for multiple-use projects. In 1955, the Corps promulgated such regulations for the Friant Division. That authoritative determination, which has been maintained consistently by the Corps since that time, is entitled to deference. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), is not to the contrary. The issue in that case was whether the reclamation laws required the government to compensate downstream water rights owners. In upholding the claims of the owners, the Court did not foreclose the

Friant Division from being deemed a flood control project under Section 702c.

III. Not only is the Friant Division (and the Madera Canal) a flood control project, but also the Madera Canal carries flood waters within the meaning of *James*. For ten months of the year, Millerton Lake stores water to control floods and to serve irrigation needs. Petitioner's approach rests on an untenable theory of legal distillation of those waters: that at some point in the process of capturing, storing, and releasing those waters it is possible to identify some as "flood waters" and some as "irrigation waters." That theory is belied by (A) the regulatory requirements governing flood releases from Friant Dam, which may be satisfied only by channeling some of those releases into the Madera Canal; (B) the contract with the Madera Irrigation District, which expressly provides for flood waters to be released into the Madera Canal; and (C) the historical record of water flows in the canal, which establish empirically that more water has been released into the Madera Canal for flood control than for principally irrigation purposes over the past twenty years. There thus can be no question that the Madera Canal is a flood control project and the waters that allegedly leaked from the canal were "for purposes of or related to flood control." *James*, 478 U.S. at 605. Moreover, petitioner's allegation that water leaked from the canal is sufficient by itself to satisfy the alternative definition of "flood waters" in *James* as "waters that such [flood control] projects cannot control." *Ibid.*

IV. In this Court petitioner advances for the first time a novel construction of the Flood Control Act not heretofore adopted by a single court: that the immunity applies only where the waters causing damage are "primarily" for the purpose of flood control. That approach conflicts with the broad immunity recognized by the *James* Court as compelled by the plain language of Section 702c. Petitioner's approach is unworkable since it requires courts to engage in

an analysis of a project's "primary" purpose that Congress itself does not specify when enacting multiple-use water projects. Petitioner's approach also produces the result—plainly inconsistent with congressional intent—that scores of multiple-use projects recognized by the Corps under its delegated rulemaking authority as flood control projects would be ineligible for Section 702c immunity.

ARGUMENT

I. *UNITED STATES* v. *JAMES* ESTABLISHES THAT THE IMMUNITY PROVIDED BY THE FLOOD CONTROL ACT MUST BE BROADLY CONSTRUED TO INCLUDE ALL DAMAGES CAUSED BY FLOOD WATERS IN A FLOOD CONTROL PROJECT

In the Flood Control Act of 1928, Congress embarked upon a multi-decade program of unprecedented scope to construct dams and other structures for flood control. See *United States* v. *Sponenbarger*, 308 U.S. 256, 262 (1939). Congress limited the government's exposure to financial liability for damages resulting from flood control activities by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

A. The *James* Test Confers Immunity From Liability For Damage From Waters Carried In Flood Control Projects That Either Are Related To Flood Control Or Cannot Be Controlled In The Project

In *United States* v. *James*, 478 U.S. 597 (1986), this Court rejected a narrow construction of Section 702c immunity, construing it to extend to both property damage and personal injury. *Id.* at 605. Noting that it "is difficult to imagine broader language" than Section 702c, the Court held that the "sweeping language" of the text and the "equally

broad and emphatic language" of its legislative history support recognition of a broad immunity for the United States. *Id.* at 604, 608. The Court added that "Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction." *Id.* at 605 (quoting 33 U.S.C. 702c).[8]

Justice Powell's opinion for the Court in *James* emphasized that a broad immunity is consistent with the purpose of Section 702c. The Court explained that "the legislative history of § 702c shows a consistent concern for limiting the Federal Government's financial liability to expenditures directly necessary for the construction and operation of the various projects." 478 U.S. at 607. The Court also stressed that "[n]umerous statements concerning the immunity provision confirm that it was intended to reaffirm sovereign immunity in such a dangerous and extensive project," including this statement from the Chair of the House Rules Committee:

> I want this bill so drafted that it will contain all the safeguards necessary for the Federal Government. If we go down there and furnish protection to these people—and I assume it is a national responsibility—I do not want to have anything left out of the bill that would protect us now and for all time to come. I for one do not want to open up a situation that will cause thousands of lawsuits for damages against the Federal Government in the next 10, 20, or 50 years. 69 Cong. Rec. 6641 (1928) (remarks of Rep. Snell).

[8] Protection of the United States from liability for flooding of land caused by alleged construction failures of a federal flood control project was central to Congress's concern in creating an immunity for federal flood control activities. See *James*, 478 U.S. at 606-608; see also *id.* at 617 (Stevens, J., dissenting) (agreeing with majority that immunity under Section 702c should extend to "overflow damage to land").

Ibid. Accordingly, Section 702c "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in *the broadest and most emphatic* language." *Id.* at 608 (emphasis added) (quoting *National Mfg. Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954)). The language the Court chose to define the scope of that immunity was correspondingly broad: "The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to *all* waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." 478 U.S. at 605 (emphasis added).[9] Under *James*, therefore, the government is entitled to immunity in this case because, as we show below, it is a matter of public record that: (1) the Madera Canal is part of a federal flood control project and (2) the waters that caused the flood *either* (a) are carried in the

[9] The Court in *James* (478 U.S. at 605) adopted virtually verbatim the position set forth in the government's brief: "Since Congress was legislating with respect to flood control projects designed to carry flood waters, the conclusion is inescapable that the statute refers to all waters contained in or carried through such structures as well as waters the structures could not retain." 85-434 U.S. Br. 17. The government noted that the Fifth Circuit in *James* had viewed the statutory language as ambiguous "because the damage that formed the basis for the tort claim might not be related to the operation of a flood control project." *Id.* at 17 n.7. Rather than broadly arguing for a test that reached well beyond the facts presented in *James*, as petitioner asserts (Br. 10), the government in *James* specifically noted that the Court did not need to decide whether the immunity applied in other circumstances, because the damage in *James* "*did* result from the release of flood waters from a federal flood control project." *Id.* at 17 n.7. The Court itself agreed with that conclusion. See 478 U.S. at 610 ("the release of the waters at the Millwood Reservoir and at the Courtableau Basin was clearly related to flood control"). As we establish on pp. 32-40, *infra*, that is also true in this case.

project "for purposes of or related to flood control" *or* (b) are "waters that such projects cannot control." *Ibid.*

B. The Court Of Appeals Properly Upheld The Government's Immunity Under *James*

The courts below properly dismissed petitioner's claims on the ground that petitioner was seeking compensation for "damage from or by floods or flood waters," within the meaning of the immunity conferred by 33 U.S.C. 702c. The court of appeals correctly held that the *James* test was satisfied because the Madera Canal is part of the Central Valley Project, which is indisputably a flood control project, and thus all waters in the Project are contained in or carried through it for purposes that are at least related to flood control. Pet. App. 3-8. Petitioner has questioned that determination, drawing support from the court of appeals' statement that the Madera Canal itself "is not a flood control project and serves no flood control purpose." *Id.* at 9. That observation, which was made without citation to any sources, is both inaccurate and legally irrelevant.

As we demonstrate in Part II, *infra*, numerous statutory and regulatory authorities establish not only that the CVP is a flood control project, but also that the Friant Division of the CVP—of which the Madera Canal is a critical component—is a flood control project. In addition, as we demonstrate in Part III, *infra*, judicially-noticeable materials establish that the Madera Canal itself serves important flood control purposes.

Moreover, regardless of the purposes for which the water is contained in or carried through the Madera Canal, the allegations in petitioner's complaint establish the second prong of the *James* test: that the property was damaged by waters that a federal flood control "project[] cannot control." 478 U.S. at 605. The complaint alleges that the "Madera Canal was constructed or has been maintained in such a fashion that substantial amounts of water leak and have

leaked from [respondent's] canal," and that petitioner's property was damaged by those alleged leaks. J.A. 9. Thus, if the Court concludes that the Madera Canal is part of a flood control project as set forth in Part II, the legal requirements for immunity under both prongs of the *James* test have been satisfied. That alternative ground for affirmance (the second prong of the *James* test) is consistent with the analysis of the court of appeals in *Morici Corp.* v. *United States*, 681 F.2d 645 (9th Cir. 1982), on which the court below relied. Pet. App. 6. In *Morici*, the Ninth Circuit had held that the government was immune from suit for flooding caused by waters that could not be controlled in the CVP because of water seepage from the Sacramento River. 681 F.2d at 646-648.

II. CONGRESS UNAMBIGUOUSLY ESTABLISHED THE FRIANT DIVISION OF THE CENTRAL VALLEY PROJECT AS A FLOOD CONTROL PROJECT

A. The Entire Central Valley Project Is A Federal Flood Control Project

In the Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850, Congress authorized all of the Central Valley Project, including its irrigation canals, as a federal flood control project. In particular, that statute provides: "[T]he *entire* Central Valley project, California, * * * is hereby reauthorized and declared to be for" purposes including "controlling floods" (emphasis added).[10] Petitioner is mistaken that the 1937 Act's authorization of the CVP for flood

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[10] See p. 7, *supra*. Subsequent statutes authorizing additional features of the CVP repeated or reincorporated that language. See, *e.g.*, Act of Sept. 26, 1950, ch. 1047, § 1, 64 Stat. 1036 ("the entire Central Valley project * * * is hereby reauthorized and declared to be for the purposes of * * * controlling floods"); Act of Aug. 27, 1954, ch. 1012, § 1, 68 Stat. 879 ("the entire Central Valley project * * * is hereby reauthorized" and declared to be for the purposes previously authorized).

control purposes extended only to its "'dam[s] and reservoirs' *but not its irrigation canals.*" Br. 27 (quoting text of statute).[11] To the contrary, Friant Dam and the Madera and Friant-Kern Canals were expressly included in plans for the CVP. H.R. Doc. 416, at 564-565.

As originally conceived and as operated for more than 50 years, the CVP's flood control operations have been integrated among the various subdivisions of the project. Because the Sacramento and San Joaquin Rivers eventually merge at a delta near San Francisco Bay, waters released from any dam on either river (or their tributaries) will affect the volume of water in the delta and such releases throughout the project must be coordinated carefully to avoid floods. Thus, courts in the Ninth Circuit have uniformly held that, notwithstanding its multiple purposes, the entire CVP is a federal flood control project for which the flood immunity applies. See, *e.g.*, *Morici Corp.*, 681 F.2d at 648 (government immune from suit for crop damages caused by seepage from Sacramento River); *Islands, Inc.* v. *United States Bureau of Reclamation*, 64 F. Supp. 2d 966, 969 (E.D. Cal. 1999); *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1439 (E.D. Cal. 1995).

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[11] Section 2 of the 1937 Act mentions the purpose of the CVP to be "controlling floods" in two provisos, only the second of which is addressed by petitioner. See 50 Stat. 850. The first proviso authorizes "the entire Central Valley project" for the purpose of "controlling floods." *Ibid.* Petitioner attempts to draw significance (Br. 27) from the fact that the second proviso of Section 2 states that "the *said* dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power." *Ibid.* (emphasis added). The absence of any mention of "canals" in the priority to be given to the respective uses of the project is not surprising, since canals were thought to serve only irrigation and flood control functions at that time. In any event, the omission of "canals" in the second proviso cannot blunt the significance of the first proviso's unambiguous intent that the "entire Central Valley Project"—which unquestionably includes its canals—is for the purpose of "controlling floods."

A few examples using projects in the San Joaquin River basin illustrate why the CVP is properly viewed as an integrated flood control project. See App., *infra*, 2a (map with water release capacities). Three dams regulate flows into the San Joaquin upstream of the Mariposa Bypass: Friant Dam (operated by the Bureau of Reclamation) on the San Joaquin River; Hidden Dam (operated by the Corps of Engineers) on the Fresno River, which flows into the San Joaquin north of Mendota; and Buchanan Dam (operated by the Corps) on the Chowchilla River, which flows into the San Joaquin River (roughly parallel to but north of the Fresno River). The Madera Canal starts at the San Joaquin, traverses the Fresno (with one bypass enabling water to be released into the Fresno and another to send water underneath the river), and empties into the Chowchilla. The Corps has calculated flood channel flows—the maximum amount of water that will not cause flooding—for those rivers in cubic feet per second (cfs). The flood channel flow of the San Joaquin immediately below Friant Dam is 8000 cfs; of the Fresno River below Hidden Dam, 5000 cfs; and of the Chowchilla River below Buchanan Dam, 5000 cfs. Thus, if each dam releases the maximum that can be accommodated by its immediate downstream channel, the releases would total 18,000 cfs. But the flood channel flow for the San Joaquin River downstream of where the Fresno and Chowchilla Rivers enter it is only 16,500 cfs. Accordingly, the three dams must coordinate their releases so that not all three are releasing their maximum at the same time, which would exceed channel capacity by 1500 cfs.

Likewise, when releases from Friant Dam must exceed 8000 cfs to avoid surpassing the reservoir's capacity, the Bureau releases water into the Madera and Friant-Kern Canals to avoid flooding on the San Joaquin below Friant

Dam.[12] Excess water from Friant may travel through the Madera Canal to be discharged into the Fresno and/or Chowchilla Rivers to avoid flooding a narrow stretch of the San Joaquin at Skaggs Branch before the Fresno flows into the San Joaquin River. But such releases must be coordinated carefully with the Corps of Engineers, which may be making releases of water from its Hidden and Buchanan Dams. See *Post-Flood Assessment* 3-34 to 3-35 (noting that "[d]uring flood management operations, floodwaters can be routed to the Fresno River via the Madera Canal" and "flows from the Madera Canal can be directed down Ash (5000 cfs) and Berenda (2000 cfs) Sloughs, about 10 miles downstream from Buchanan Dam" on the Chowchilla River). These examples of routine practice illustrate what is true of the entire Central Valley Project: that the release of water at one place necessarily affects decisions by Corps and Bureau personnel as to whether water should be released at another place. The court below thus properly held that the United States is immune from petitioner's suit because the CVP, of which the Madera Canal is a part, is a flood control project. See Pet. App. 8.

B. Congress Specified That The Friant Division Of The CVP Is A Flood Control Project

Even if Congress's intent had been unclear in designating the entire Central Valley Project as a federal flood control project warranting application of Section 702c immunity, any such ambiguity would be irrelevant here because Congress

[12] An additional complicating factor in release calculations from Friant Dam is that the Little Dry, Big Dry, and Cottonwood Creeks empty into the San Joaquin River just below Friant Dam, so their flow at peak levels must be subtracted from the amount of water that may safely be released from Friant Dam. That amount of water, in turn, must either be stored in Millerton Lake until it can be safely released downstream or released into the Madera and/or Friant-Kern Canals. See *Post-Flood Assessment* 3-33 to 3-34.

has provided that the Friant Division is itself a federal flood control project. Petitioner correctly identifies the reclamation purposes of the Friant Division (Br. 27-31), but overlooks key enactments establishing Congress' intent that the project also perform flood control functions.

In 1936, Congress "recognized that destructive floods upon the rivers of the United States * * * constitute a menace to national welfare." Flood Control Act of 1936, ch. 688, § 1, 49 Stat. 1570. Congress directed the Corps of Engineers to embark on "Federal investigations and improvements of rivers and other waterways for flood control and allied purposes," further providing that such investigations "not interfere with investigations and river improvements incident to reclamation projects * * * undertaken by the Bureau of Reclamation." § 2, 49 Stat. 1570-1571. Congress specifically instructed the Corps "to cause preliminary examinations and surveys for flood control at the following-named localities," specifying further that "the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law: * * * San Joaquin River from Herndon to Antioch and its main east side tributaries." § 6, 49 Stat. 1592, 1595. The 1936 Flood Control Act required the Corps to study scores of rivers and to implement flood control improvements in dozens of others.

In 1938, Congress authorized an appropriation of $375 million for flood control works nationwide over the five-year period ending June 30, 1944. See Act of June 28, 1938, ch. 795, §9, 52 Stat. 1226. The following year, a House report advocated "annual authorizations for flood-control projects to protect lives and property in the orderly development of the national policy of flood control." H.R. Misc. Rep. No. 799, 76th Cong., 1st Sess. 2 (1939). By 1941, that general recognition of the widespread need for a comprehensive flood control policy had expanded to multiple-use projects. "Plans

for control of destructive floodwaters should to the extent practicable provide for their conservation and use for the benefit of all the people * * * to meet urgent needs for flood control, irrigation, and navigation and to satisfy the growing demands for electric power." H.R. Misc. Rep. No. 759, 77th Cong., 1st Sess. 3, 5 (1941).

The Nation's entry into World War II delayed implementation of that policy, but by 1944 Congress again turned its attention to flood control. The Flood Control Act of 1944 confirms that Congress intended the Friant Division (as well as many other multiple-use projects) to be a federal flood control project. Section 1 expressed Congress's intent to "preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers" and "to facilitate the consideration of projects on a basis of comprehensive and coordinated development." 58 Stat. 888. The Act mandated coordination between and among the Corps of Engineers, the Bureau of Reclamation, and the Secretary of Agriculture (who had responsibility for assessing flood effects on soil erosion and watersheds) in the investigation, planning, and operation of projects. § 1, 58 Stat. 888-889.

In Section 7 of the 1944 Act, Congress provided specifically that multiple-use projects operated by agencies other than the Corps be deemed federal flood control projects, and that they would be operated for that purpose in a manner prescribed by the Corps, pursuant to expressly delegated rulemaking authority:

> Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations.

58 Stat. 890. See also H.R. Rep. No. 1309, at 7 (noting that such legislation was necessary because "recent experiences in the operation of multiple-purpose reservoirs during major floods has demonstrated that to assure the expected flood-control benefits" such projects should adhere to Corps of Engineers flood-control operational rules). The Corps has exercised that rulemaking expressly with respect to the flood control operations of the Friant Division. See pp. 27-30, *infra*.

The 1944 Act also specifically recognized the Friant Division as a federal flood control project. As was its normal practice in those years, Congress adopted the report and recommendations of the Corps of Engineers directly in the text of the enacted legislation, thereby putting a congressional imprimatur on the specific findings and policies proposed by the Corps. Thus, in addition to the many other multiple-use projects authorized in the Flood Control Act of 1944, Section 10 provided that: "The plan of improvement for flood control and other purposes on the Lower San Joaquin River and tributaries, including Tuolumne and Stanislaus Rivers, in accordance with the recommendations of the Chief of Engineers in Flood Control Committee Document Numbered 2, Seventy-eighth Congress, second session, is approved, and there is hereby authorized $8,000,000 for initiation and partial accomplishment of the plan." 58 Stat. 901.

In Flood Control Document No. 2, in turn, the Corps recommended operating the Friant Division as a flood control project. See H.R. Comm. on Flood Control Doc. No. 2, 78th Cong., 2d Sess., *San Joaquin River and Tributaries* (Comm. Print 1944) (Flood Control Doc. No. 2). The Corps noted that "[t]he floods of 1937 and 1938 resulted in widespread damage on the San Joaquin River and its majortributaries and made evident the necessity for a comprehensive plan of control embracing the entire San Joaquin River system." *Id.* at 23. It further tabulated data indicating that the

1937 floods had produced peak natural flow from rain floods on the San Joaquin River at Friant of 77,000 cubic feet per second (cfs). *Id.* at 26, Tab. 15. To place that huge volume in proper context, the Corps recommended that Friant Dam be operated so that no more than 7000 cfs would be released into the San Joaquin above Skaggs Branch. *Id.* at 39, Tab. 22. Notwithstanding the paucity of economic development along the San Joaquin in that era, the Corps estimated that the 1937 floods caused flood damage of $1.46 million. *Id.* at 32, Tab. 20.

The massive flooding of 1937-1938 initiated a major reorientation in the thinking of the Corps and Congress. The Corps formally recommended a "plan of improvement" for the Friant Reservoir [Millerton Lake] "to obtain the maximum flood control possible without impairment of irrigation yield, *i.e.*, operation in accordance with criteria given in paragraph 82,(a)." Flood Control Doc. No. 2, at 35. It is apparent that the Corps factored in the use of the Madera and Friant-Kern Canals for flood control in its calculations: "Present plans provide for gross storage of 520,000 acre-feet, inactive storage (below canal outlets) of 130,000 acre-feet, and flood outlet capacity exceeding 12,000 cubic feet per second before any of the active storage space is occupied." *Id.* at 35. In calculating the 12,000 cfs flood release from the Friant Dam, the Corps expressly noted that only 7000 cfs could be released from Friant Dam into the San Joaquin River without causing a flood between Skaggs Branch and Mendota. See *id.* at 39, Tab. 22. The capacities of the Madera Canal of approximately 1000 cfs and the Friant-Kern Canal of approximately 4000 cfs, added to the 7000 cfs capacity that the Corps calculated could be safely released from the dam into the river, thus accounted for the Corps' conclusion that the project had a "flood outlet capacity exceeding 12,000 cubic feet per second." *Ibid.*

In forwarding the Corps' recommendations to Congress, which the 1944 Act subsequently enacted, the Chief of

Engineers stressed that "[t]he plan also contemplates that Friant Reservoir, now under construction as an element of the Central Valley project, will be so operated as to afford the maximum degree of flood control compatible with its primary use for irrigation." Flood Control Doc. No. 2, at 3. The Corps recommended specific design features for the project so that the flood control value of the total project costs estimated at $3.5 million could be realized. *Id.* at 45. Operated according to plan, "about 82 percent of the total average annual flood damage for the period of record would be prevented." *Ibid.* The 1944 Act and its legislative history thus conclusively refute petitioner's assertion (Br. 40) that "there simply is no basis to conclude that Congress conceived of [the Friant Division] as a 'flood control project.'"

C. The Corps of Engineers' Longstanding And Consistent Determination That The Friant Division Is A Flood Control Project Is Entitled To Deference

1. In 1955, the Corps of Engineers first promulgated regulations pursuant to the delegated rulemaking authority of Section 7 of the 1944 Act that governed "the use and operation of Friant Dam and Reservoir on San Joaquin River, California, for flood control purposes." 20 Fed. Reg. 9181. Those rules, which have since been augmented, establish three required operational conditions that can only be achieved if the Madera and Friant-Kern Canals are used for release of flood waters: (1) releases from Friant Dam "shall be restricted to quantities which will not cause downstream flows to exceed, insofar as possible, * * * 8,000 cubic feet per second between Friant and Skaggs Bridge";[13] (2) "[s]torage space in Friant Reservoir [Millerton Lake] shall be kept available for flood control purposes in

[13] In its 1944 estimates, which were made prior to completion of Friant Dam, the Corps had put this number at 7000 cubic feet per second. See Flood Control Doc. No. 2, at 39, Tab. 22.

accordance with the Flood Control Storage Reservation Diagram currently in force," *ibid.*; and (3) "[i]n the event that the reservoir level rises above elevation 578 at the dam (top of spillway gates), subsequent operation of the dam shall be such as to cause downstream flows and stages to exceed as little as possible the criteria prescribed in paragraph (a) of this section," *ibid.* While the Corps' criteria do not expressly specify use of the Madera and Friant-Kern Canals, they must be used for the release of water in excess of 8000 cfs to comply with those rules. Since the issuance of those formal rules in 1955, the Corps has included the Friant Division in its list of projects operated by other agencies under Corps-directed flood control rules pursuant to Section 7 of the 1944 Act. See 33 C.F.R. 208.11(e).[14]

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[14] Even prior to the promulgation of those rules by the Corps, the Secretary of the Interior recognized the Friant Division's important flood-control role, reporting to the President in 1947 that "operation of Millerton Lake for flood-control purposes will be such as to prevent the maximum discharge under the worst flood conditions on the San Joaquin River, except one, between 1902 and 1943, from exceeding 8,000 cubic feet per second at Skaggs Bridge." H.R. Doc. No. 146, 80th Cong., 1st Sess. 10-11 (1947). Similarly, the Interior Department's 1949 report to Congress on the "Central Valley Basin" contained repeated references to the flood control function of the CVP's Friant component. S. Doc. No. 113, at 36 (referring to "flood-control benefits from works in Sacramento and lower San Joaquin Valleys * * * including the benefits from Shasta and Friant Reservoirs"); *id.* at 78 (referring to "flood-control benefits from the comprehensive plan, includeing those from the operation of Shasta and Friant Reservoirs"); *id.* at 93 (stating that "Millerton Lake, formed by Friant Dam * * * will regulate floods and store San Joaquin River run-off for diversion into the Madera and Friant-Kern canals"); *id.* at 132 (describing one of the functions of Millerton Lake as "to provide flood control on San Joaquin River"); *id.* at 164 (referring to "additional protection" against flooding along the San Joaquin River and in the Sacramento-San Joaquin delta provided by "Millerton Lake (Friant) Reservoir"); *id.* at 167 (describing future flood control benefits on the San Joaquin River and its tributaries "attributable to Friant Reservoir, the various prospective reservoirs, channel improvements, and other flood-control works").

2. Plans for the Friant Division adopted pursuant to those regulations address the operation of the dam *and* its related canals. The Flood Control Storage Reservation Diagram referenced in 20 Fed. Reg. at 9181 is Chart A-11 to the *Friant Flood Report.* That Diagram shows generally what space should be made available in Millerton Lake for various purposes at different times during the average water year. From approximately October 1 through August 1, the Corps requires the Bureau to maintain space in Millerton Lake to handle either rain floods (October 1 to March 15) or snow-melt runoff (March 15 to July 31). According to the Flood Control Diagram, "[w]ater stored in rainflood space shall be released as rapidly as possible without exceeding 8,000 cfs below Little Dry Cr[eek] or 6,500 cfs at the near Mendota gage." *Friant Flood Report* Chart A-11. Similarly, during the period of snow-melt runoff, implementation of the Diagram requires that space referred to as "conditional space" be reserved to meet the dual needs of accommodating flood water and providing water for irrigation. "When water is stored in the portion of conditional space required for flood control, a supplemental release in addition to irrigation demand must be made." *Ibid.* The Corps calculates the current maximum initial capacity of the Madera Canal as 1200 cfs, declining to 625 cfs at the canal's terminus at the Chowchilla River, and of the Friant-Kern Canal as 4500 cfs declining gradually to 2000 at its terminus. *Id.* at 11. As a general matter, flood releases into the Madera and Friant-Kern Canals because of rain floods occur from December until April, when irrigation demand is low. Thereafter, melting snow is the primary source of flood releases into the canals. Such flood releases may coincide with or far exceed irrigation needs. See pp. 37-40, *infra.*

The Corps' determination, through rulemaking, that the Friant Division operates as a flood control project is entitled to this Court's deference. *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984); *accord Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662 (2000).[15]

D. Petitioner's Reliance On *Gerlach* Is Misplaced

Petitioner erroneously contends (Br. 35-40) that this Court's decision in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (*Gerlach*), establishes that Section 702c does not apply here because the Friant Division is a reclamation project and not a flood control project. In *Gerlach*, property owners downstream from Friant Dam who had rights to the waters of the San Joaquin River had obtained awards from the court of claims for takings caused by the dam's restriction of the river's flow. Challenging those awards, the United States argued in this Court that it was not liable for any such takings because the authorized purposes of the CVP as a whole included flood control and navigation. The theory behind the government's reading of the applicable statutes was that those purposes supported a

[15] The fact that the structures authorized in the Flood Control Act of 1928 to control floods on the Mississippi River may not have included the kind of multiple-use projects later undertaken in the Western states and in other parts of the country (see Pet. Br. 14 n.4) does not undercut the application of Section 702c to such projects. The courts of appeals have consistently held since long before *James*, and petitioner does argue to the contrary, that Section 702c applies to flood control projects authorized by separate statutes that succeeded the 1928 Act. See *Aetna Ins. Co.* v. *United States*, 628 F.2d 1201, 1204 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981); *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F.2d 1081, 1086 & n.4 (6th Cir. 1978); cf. *National Mfg. Co.*, 210 F.2d at 270. The direct link between the Flood Control Act of 1928 and Congress' subsequent enactments in the area of flood control supports the longstanding interpretation of Section 702c to apply to projects in addition to those authorized in the 1928 statute. See Flood Control Act of 1936, ch. 688, § 8, 49 Stat. 1596 (specifically saving all provisions of the 1928 Act); Flood Control Act of 1944, ch. 665 § 2, 58 Stat. 889 (referencing the 1936 Act). See also *James*, *supra* (applying Section 702c to project authorized under the Flood Control Act of 1946, ch. 596, 60 Stat. 647).

"superior navigation easement" that superseded the interests of the water rights owners in downstream riparian rights. 339 U.S. at 736.

In disagreeing with that position, this Court held that Congress intended to compensate owners of water rights. The Court explained that Congress had made the Friant Division subject to federal reclamation law, which requires recognition of all vested rights under state law, including water rights. 339 U.S. at 734-736. The Court also noted that, prior to that litigation, the Bureau of Reclamation had consistently respected the water rights of land owners affected by reclamation projects by, *inter alia*, requesting appropriations to purchase such rights. *Id.* at 735 & n.9.

The Court did not decide in *Gerlach* that because the Friant Division is a reclamation project, it is therefore not a flood control project. Indeed, the Court noted that under a formula "approved by the President, * * * *multiple purpose dams* [in the CVP] are the responsibility of the Bureau of Reclamation," whereas "dams and other works *only for flood control* are exclusively the responsibility of the Army Engineers." 339 U.S. at 733-734 (emphasis added). Thus, by concluding that the Friant Division is a reclamation project subject to the reclamation laws, the Court simply acknowledged that flood control is not its *sole* purpose. *Gerlach* does not hold, or even suggest, that the Friant Division is not a "flood control project" as this Court used those words in *James*.[16] In any event, even if *Gerlach* could

[16] Petitioner places significance (Br. 38) on the statement in *Gerlach* that "[t]he Central Valley basin development envisions, in one sense, an integrated undertaking, but also an aggregate of many subsidiary projects, each of which is of first magnitude." 339 U.S. at 733. In the context of that case, however, the Court's reference to treating the subdivisions of the CVP as each of "first magnitude" is most naturally understood to mean that Congress had specifically directed that the reclamation laws apply to the Friant Division. The Court in *Gerlach* did not address how such a focus on the CVP's "subsidiary projects"—here, the Friant

be read as petitioner urges, the Corps of Engineers determined five years later that the CVP's Friant Division is a federal flood control project pursuant to its delegated rulemaking authority under the Flood Control Act of 1944. See 20 Fed. Reg. at 9181.

III. THE MADERA CANAL CARRIES WATERS RELATED TO FLOOD CONTROL WITHIN THE MEANING OF *JAMES*

Petitioner argues (Br. 23) that "flood waters" are distinct from "irrigation water," and that only the latter flowed through the Madera Canal, allegedly damaging petitioner's property. The fact that water may be put to beneficial uses —such as irrigation—does not preclude it from being "flood water" within the meaning of Section 702c. In *James*, this Court provided a simple, functional definition for that term. Water in a federal flood control project is "flood water" if it is carried through the project "for purposes of or related to flood control" or if it is "water[] that such [a] project[] cannot control." 478 U.S. at 605. The water in the Madera Canal meets both alternative facets of that definition.[17]

Division—would affect the application of Section 702c. We have shown, however, that flood control is a central purpose of the Friant Division, so even an enquiry focused on that component of the CVP would not undercut application of the immunity here.

[17] Petitioner's complaint asserts only that the Madera Canal is used for irrigation purposes, and not that its *exclusive* use is for irrigation. See J.A. 8. Thus, accepting the allegations as true does not foreclose the government's defense that the canal also carries flood waters, or that the irrigation waters also serve a flood control function. In any event, even if the complaint is liberally construed in petitioner's favor, the government is entitled to judgment on the pleadings when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). A court may take judicial notice of matters of public record—such as statements in judicial opinions, regulatory documents, and historical records—that refute the allegations in the complaint. See, *e.g.*, *Papasan*

A. Waters Released Into Madera Canal Cannot Be Segregated Into "Flood" And "Irrigation" Waters

The Flood Control Diagram for Friant Dam shows that, during most of the year (October through July), Millerton Lake stores water both to control floods and to meet irrigation needs. *Friant Flood Report* App. A, Chart A-11. Water can be released from the reservoir in three ways: (1) through the canals, (2) through outlets in the dam that send water down the river, and (3) over the dam's spillway, which likewise sends water down the river. *Id.* at 15. Discharges to serve the respective demands of flood control and irrigation are made from a single, undifferentiated body of water behind the dam—Millerton Lake. As an empirical matter, it is not true that the quantity of water released down the river always at least equaled the total quantity that the Flood Control Diagram requires to be released to create the necessary storage space for flood control. See pp. 37-40, *infra*. Even if that were not so, it would be unreasonable to regard every drop of "flood water" as going down the river (see Pet. Br. 25) and, concomitantly, all water flowing into the Madera Canal as consisting purely of "irrigation water." Petitioner's theory misperceives the Friant Division's operations in practice and the historical record of releases of water into the irrigation canals.

Between 1873 and 1979, the annual flows below Friant varied widely, with a low of 361,500 acre-feet (representing approximately 60 percent of Millerton Lake's storage capacity) in 1977 to a high of 4,367,800 acre-feet in 1906 (meaning that the reservoir would have been filled and emptied more

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v. *Allain*, 478 U.S. 265, 268 n.1 (1986) (in reviewing motion to dismiss under Fed. R. Civ. P. 12, "we are not precluded in our review of the complaint from taking notice of items in the public record"); *Bowen* v. *Johnston*, 306 U.S. 19, 23 (1939); *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885); *Menominee Indian Tribe* v. *Thompson*, 161 F.3d 449, 455-462 (7th Cir. 1998), cert. denied, 526 U.S. 1066 (1999).

than eight times during the course of the year). The mean annual unimpaired flow for that period is 1,790,700 acre-feet, which is three-and-one-half times the storage capacity of the reservoir. See *Friant Flood Report* Chart 5. Thus, except in the most severe drought years, the waters stored to prevent floods behind Friant Dam are transferred to the canals (during the course of the year) for both flood control and irrigation purposes in a manner that is impossible to segregate. Releases for irrigation in high flow years also serve a flood control purpose, and water released for flood control may be stored by irrigators for later irrigation use or to recharge ground water. That type of multiple-use was precisely what Congress intended for the project. See pp. 7, 24-25, *supra*.

To characterize the water carried through the Madera Canal as "related to flood control" (*James*, 478 U.S. at 605) is thus hardly "metaphysical," as petitioner asserts (see Br. 12). Rather, that label better describes petitioner's conception that dammed water in a reservoir can somehow be legally distilled into "irrigation" molecules and "flood control" molecules. Water is stored and released when and where it can best achieve the multiple purposes of the project. If a flood can be avoided by releasing water into the canals, that water does not lose its character as flood waters, and the government does not lose its immunity, merely because the government has arranged to provide some of that water to irrigators.[18] Moreover, petitioner's insistence

[18] Petitioner seemingly acknowledges that some of the water that flowed through the Madera Canal was stored in Millerton Lake for the purpose of controlling floods. See Br. 8 ("*[a] large proportion* of the waters that damaged Petitioner were not 'flood waters' even when originally stored behind Friant Dam") (emphasis added); *id.* at 22 ("*a large proportion* of the water that has damaged Petitioner's farm has no relationship to flood control at all") (emphasis added); *id.* at 23 ("*a still much smaller proportion* of the contents of the Madera Canal could include those waters," referring to waters stored behind the dam that could otherwise have caused flooding) (emphasis added).

that the beneficial use of stored water—here for irrigation—deprives it of legal status as "flood water" is inconsistent with *James*. The Court held there that Section 702c applied to damages to recreational users of federal flood control lakes who were dragged through dam gates when water was being released for flood control purposes. According to petitioner, "*James* indicates that [Section 702c] encompasses waters originally stored and later diverted for purposes of flood control notwithstanding that in the interim they may have provided incidental benefits, including recreational activities such as boating." Br. 19. That reasoning is unpersuasive. First, it erroneously assumes that a singular purpose can be ascribed to water in a multiple-use project. Second, there is no basis for petitioner's apparent position that water in a federal flood control lake retains its character as "flood water" if its beneficial use *precedes* its release from the dam, but not when its beneficial use *follows* such release. Moreover, a single release may accomplish two purposes concurrently; the flood control benefit of a release for irrigation may rest in increasing storage capacity for an anticipated flood. Finally, the allegations in petitioner's complaint in any event do not require the Court to make such a fine distinction, because the leaks resulting from long-term, structural damage asserted by petitioner cannot be ascribed to a single purpose of the project.

B. The Madera Irrigation District Contract Expressly Provides For Flood Water To Be Released Into Madera Canal

Because of the highly-variable water supply that flows into Millerton Lake, the Bureau of Reclamation has entered into contracts reflecting the historical reality that flood waters must be diverted into the Madera and Friant-Kern

Canals to optimize the multiple-use objectives of the project. The contract with the Madera Irrigation District, for example, defines Class 1 water as "a dependable water supply during each Year" and Class 2 water as "undependable in character and will be furnished only if, as, and when it can be made available as determined by the [Bureau of Reclamation]." Interim Renewal Contract Between the United States and Madera Irrigation District Providing for Project Water Service (MID Contract), Art. 1(c) and (d). Class 2 water is "available for irrigation purposes during spring months of wet years," *Friant Flood Report* 14 n.2, because it is "necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria," MID Contract, Art. 3(h)(1).[19]

The price charged for Class 1 water historically has been at about twice the rate charged for Class 2 water. Because of its undependable character, Class 2 water may be delivered at times that are inconvenient to all members of the irrigation district, but whose individual members nonetheless may wish to purchase that water to store it for later use, to recharge groundwater supplies, or to irrigate in off-peak periods. Article 3(h)(1) of the MID Contract specifically provides for the contingency of flood releases as Class 2 water: "If, during the months of March through September, the [Bureau of Reclamation official] determines it will be necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria, he may establish" periods of time in which irrigators may be obligated to purchase Class 2 water.

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[19] In the district court petitioner stipulated to the fact that "[t]he United States entered into an agreement with [Madera Irrigation District (MID)] whereby MID was allowed to flow water through the Madera Canal on the terms and conditions specifically set forth in the agreement." J.A. 72; see also J.A. 81 (scheduling conference order confirming factual stipulation). We have lodged copies of this contract with the Clerk.

Precisely because the availability of flood waters typically begins in the months immediately preceding the irrigation season, the contract provides incentives for the Madera Irrigation District to purchase Class 2 flood water by obligating it either to pay for such water released into the Madera Canal or to forfeit a certain percentage right to purchase Class 2 water at a later date. Thus, if the irrigation contractor does not purchase flood waters released into the Madera Canal in March, the contract provides for forfeiture of up to 7% of the total Class 2 water supply it has contracted to purchase for that year. Unpurchased Class 2 flood water in April may lead to forfeiture of 12% of the contractor's Class 2 total annual water supply, with the percentage rising to 16% for unpurchased Class 2 supply for May, and to 20% for "any other month." MID Contract, Art. 3(h)(3). Flood water released into Madera Canal that is unpurchased as Class 2 water simply flows through the canal and is ultimately released into the Fresno and/or Chowchilla Rivers. The contractual arrangement requires irrigators to accept flood water in the canal, thereby demonstrating that the irrigation purpose of the Madera Canal must coexist with, and at times be subordinate to, the flood control purpose of the facility.

C. The Madera Canal Receives Water Intended Solely For Flood Control Purposes

1. In addition to the dual flood control and irrigation purposes that may be served simultaneously by water releases into the Madera and Friant-Kern Canals, releases serve solely a flood control function in periods of high water flow or when capacity in Millerton Lake must be made available for anticipated inflows. Without citation to any authority, petitioner asserts (Br. 25) that all flood releases from Friant Dam automatically are made into the San Joaquin River. The 1999 Corps report, however, conclusively refutes that assertion: "Typically, during high snow-

melt the Madera Canal can be used to convey up to 1,200 cfs into the Fresno-Chowchilla River system." *Post-Flood Assessment* 3-32. That report notes some of the important discretionary considerations that the Corps and Bureau must take into account that influence a decision to release flood water not intended for irrigation into the Madera and Friant-Kern Canals. Even when a release of water downstream could be made without exceeding the maximum release level of 8000 cfs, for example, the Bureau (pursuant to Corps' rules) releases flood waters into the canals for other reasons, including to ensure safer recreational usage of the San Joaquin, to protect areas downstream, to avert flooding downstream just below Friant Dam, and to avoid flooding at the Mendota Dam. *Id.* 3-32 to 3-33. Releases into the Madera Canal serve those purposes even when downstream releases would not exceed 8000 cfs. *Id.* at 3-33.

Petitioner thus erroneously describes the Field Working Agreement between the Corps and the Bureau as "establish-[ing] that a substantial proportion of the water that damaged Petitioner's farm has no relationship to flood control whatsoever" and in requiring releases "only into the river bed, not the Madera Canal." Br. 25. Petitioner cites nothing in the agreement itself to support those assertions, and the foregoing description of the operations of the Friant Division is consistent with the proposal made by the Corps that was adopted by Congress in 1944, the Corps' implementing regulations in 1955, and more than four decades of experience of flood control operations in the Friant Division.

2. The history of water releases from Friant Dam, as documented by publicly-available data from the U.S. Geological Survey, also supports the conclusion that the Madera and Friant-Kern Canals are routinely used for flood releases, except in the most severe drought years. As of 1980, according to the Corps of Engineers, 138,000 acre-feet of water each year is released into the Madera Canal to meet

requirements for supplying Class 1 irrigation water.[20] During the twenty-year period between 1979 and 1999, however, the amount of acre-feet of water released annually into the Madera Canal well exceeded the 138,000 acre-feet intended predominantly for irrigation use (Class 1 water) in every year except the severe drought years of 1989-1990 (111,757 acre-feet) and 1991-1992 (126,750 acre-feet).[21] In all other years (18) of that twenty-year period, the amount of water released into the Madera Canal exceeded the amount dedicated predominantly for irrigation. Moreover, in eleven of those eighteen years, the amount of water released was far greater than the amount needed to meet irrigation obligations by the Bureau of Reclamation.[22] Nor were the years in those two decades anomalous. Based on a calculation of the mean total acre-feet per month released into the Madera Canal between 1949 and 1999, the total yearly mean released in those years was 264,740 acre-feet, or approximately

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[20] "Class 1" water is that amount of water the irrigators can rely on the Bureau to deliver except in the most severe drought years. As such, the government commits to supplying at least that amount of water each year to irrigators. Any other water supplied is conditional upon flood flows. See *Friant Flood Report* 14 n.1; see also MID Contract, Art. 1(c).

[21] The U.S. Geological Survey monitors water releases throughout California (and elsewhere in the country). All of the data cited in the text and notes is compiled from historical stream flow data for releases from Friant Dam to the Madera Canal monitored at Gaging Station No. 11249500, which is available on the U.S. Geological Survey web site <<*http://water.wr.usgs.gov/index.html*>>.

[22] The following data, based on adding the monthly totals available from USGS, are total acre-feet of water per year released into the Madera Canal: 1979-1980 (483,660); 1981-1982 (456,440); 1982-1983 (532,600); 1983-1984 (340,450); 1985-1986 (513,030); 1992-1993 (390,310); 1994-1995 (389,110); 1995-1996 (363,380); 1996-1997 (391,980); 1997-1998 (355,290); and 1998-1999 (323,150). Thus, even if one were to assume that the 138,000 acre-feet per year released for Class 1 irrigation water supply has had no relation whatsoever to flood control, most of the water released in those years had a flood control purpose. *E.g.*, 1979-1980 (483,660 - 138,000 = 345,660 acre-feet).

double the amount of water dedicated predominantly for irrigation purposes. Indeed, contrary to petitioner's undocumented assertion that "a large proportion of the water that has damaged Petitioner's farm has no relationship to flood control at all" (Br. 22), data collected from the past twenty years establish that more water has been released into the Madera Canal for flood control purposes than for predominantly irrigation purposes.[23]

The Court thus need not go beyond the test it articulated in *James* to resolve this case. All parts of the CVP and its Friant Division, including the Madera Canal, operate as a federal flood control project, and the waters that allegedly escaped from the canal and damaged petitioner's property both had a direct relationship to flood control and constituted waters that the project could not control. Petitioner simply misapprehends (Br. 19) the practical operation of the Friant Division as demonstrated by statutory requirements, regulatory implementation, and historical practice when asserting that "the Madera Canal has at most an exceedingly attenuated relationship to flood control activities."

IV. PETITIONER'S PROPOSAL TO LIMIT SECTION 702c TO DAMAGES CAUSED BY PROJECTS WITH A PRIMARY PURPOSE OF FLOOD CONTROL IS FLAWED

Petitioner proposes a new test for Section 702c immunity: "[W]hether the waters [causing the damage] were carried in a flood control project 'primarily for the purpose of flood control.'" Br. 19. Until its brief on the merits in this Court, petitioner had not advanced that position in this litigation; it

[23] Between 1979 and 1999, a total of 5,965,161 acre-feet of water has been released into the Madera Canal. Assuming the figure of 138,000 acre-feet of Class 1 water per year, the total amount of water released to serve a predominantly irrigation purpose was 2,760,000 acre-feet. The remainder—3,205,161 acre-feet—was water that served a flood control purpose.

had instead argued that "for water to be 'flood water' it would have to (1) pass through a flood control project and (2) be for the purposes of or related to flood control." Pet. App. 3. Petitioner's new approach, which has not been adopted by any court of appeals, is flawed.

A. The "Primary Purpose" Test Conflicts With The Text Of Section 702c As Construed In *James*

1. Petitioner argues that its "primary purpose" test is the "most consistent with Congress' intent." Br. 19. As this Court recognized in *James*, however, the "starting point" for determining that intent is "the language of the statute itself." 478 U.S. at 604 (quotation omitted). In *James* the Court emphasized the "sweeping terms" of Section 702c, noting the statute's reference to "'[n]o liability of *any* kind * * * for *any* damage from or by floods or flood waters at *any* place.'" *Ibid.* (quoting Section 702c). As the Court recognized, "[i]t is difficult to imagine broader language." *Ibid.* That language, and the "equally broad and emphatic language found in the legislative history," showed that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608. Far from being the "most consistent" (Pet. Br. 19) with that intent, petitioner's reading of Section 702c would considerably narrow the broad immunity set forth in the statutory language and recognized in *James*.

2. Petitioner cites other statutory provisions that ostensibly would be affected by a failure of this Court to adopt petitioner's approach. See Pet. Br. 11-12 & n.2 (discussing 33 U.S.C. 702j-2), 14-16 (discussing 33 U.S.C. 702j). By their plain terms, however, those statutory references are inapposite.

Petitioner cites (Br. 12) 33 U.S.C. 702j-2, for example, which was enacted in 1936 as a specific immunity provision for the White River Levee District. The provision afforded

immunity from *any* damages—whether caused by flooding or not—"on account of the use of said area [both submerged and unsubmerged land] for reservoir purposes during said emergency." 33 U.S.C. 702j-2, Act of June 15, 1936, ch. 548, § 5, 49 Stat. 1509. That provision does not amend or limit Section 702c in any way, and its distinctive scope and purposes are hardly rendered "superfluous" (Pet. Br. 12) by rejection of petitioner's newly proposed "primary purpose" test.

Petitioner is similarly mistaken in asserting (Br. 14-16) that 33 U.S.C. 702j provides support for the "primary purpose" test. That provision, which was enacted in 1928, directed the Corps of Engineers to submit plans to Congress for flood control projects on tributaries to the Mississippi River and to report on the possible beneficial effects of building a system of reservoirs on those tributaries. 33 U.S.C. 702j. Petitioner points out that Congress referred in Section 702j to waters, once they were contained in reservoirs, as "reservoired waters." According to petitioner, Congress thus must have meant to distinguish "reservoired waters" in Section 702j from "flood waters" in Section 702c, and specifically must have intended the latter term to exclude "waters stored and then diverted for some beneficial purpose *other than flood control*." Br. 14 (emphasis added).

Petitioner's suggested dichotomy between "reservoired waters" and "flood waters" goes too far, however, because flood control dams accomplish *all* of their beneficial purposes, *including flood control*, by converting the entire flow of the river into "reservoired waters." Temporary storage of water in reservoirs permits its use for recreation, irrigation, power generation, and the prevention of floods. Indeed, in *James* the Court found that the government's immunity under Section 702c applied to damage from reservoired waters that had been used for recreational purposes. In *James*, as here, reservoired waters serving multiple uses were released "to prevent flooding." 478 U.S. at 605-606 n.7.

To distinguish *James*, petitioner must ask the Court to hold that water entering a reservoir as "flood water" retains that character if it is put to recreational uses, but not if it is used for irrigation, or perhaps to hold that immunity is defeated by beneficial use apart from flood control *after* release from the reservoir but not by such non-flood beneficial use *before* release. Those distinctions should be rejected. They have no relationship to the purpose of the immunity in facilitating federal investment in flood control projects by shielding the United States from liability for damages caused by flood waters in these projects.

Petitioner also invokes the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, to support its proposed "primary purpose" test, but *James* definitively rebuts that argument. Petitioner points out (Br. 16-18) that Congress considered, and failed to enact, exceptions to the FTCA that would have explicitly covered flood control and irrigation projects. The result, according to petitioner (Br. 18), is that negligent operation of federal flood control projects is excluded from the FTCA's waiver of sovereign immunity only if the negligent conduct is within the scope of the FTCA's "discretionary function exception." 28 U.S.C. 2680(a). If that were so, however, the Court in *James* would have had to determine first whether the negligence alleged in that case was within the discretionary function exception. The Court did not do so, but instead assumed that the alleged government negligence fell *outside* the scope of any exception to the FTCA: "This case presents the question whether [Section 702c] * * * bars recovery *where the Federal Government would otherwise be liable under the Federal Tort Claims Act*." 478 U.S. at 598-599 (emphasis added). By determining that Section 702c immunity applied

to such a case, the Court held that the FTCA did not amend or displace Section 702c.[24]

B. Petitioner's "Primary Purpose" Test Finds No Support In Court Of Appeals' Decisions

The "primary purpose" test petitioner now proposes has not been adopted by any court of appeals in the wake of *James*. See notes 26 & 27, *infra*. Nor would petitioner prevail (see Pet. 18, Pet. Reply 1) under the approaches that have been adopted by other circuits. See Br. in Opp. 11-16. Contrary to petitioner's suggestion (Br. 7), *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992), did not articulate a "primary purpose" test. On the contrary, the court of appeals in *Henderson* stated that "section 702c immunity applies if 'governmental control of flood waters was a *substantial factor* in causing [the plaintiff's] injuries.'" *Id.* at 1492 (quoting *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246, 247 (8th Cir. 1989), cert. denied, 494 U.S. 1016 (1990)) (emphasis added). The Eighth Circuit rejected immunity not because flood control was "the primary purpose" of the project in question (which was power generation), but rather because flood control was not even a substantial factor in causing the injury.[25]

[24] Not only did this Court reject that argument in *James*, but every court of appeals to consider that contention prior to *James* had also rejected it. See, *e.g.*, *Aetna Ins. Co.*, 628 F.2d at 1204-1205; *Callaway* v. *United States*, 568 F.2d 684 (10th Cir. 1978); *Florida E. Coast Ry.* v. *United States*, 519 F.2d 1184 (5th Cir. 1975); *Parks* v. *United States*, 370 F.2d 92 (2d Cir. 1966); *Stover* v. *United States*, 332 F.2d 204 (9th Cir.), cert. denied, 379 U.S. 922 (1964); *National Mfg. Co.* v. *United States*, 210 F.2d 263 (8th Cir.), cert. denied, 347 U.S. 967 (1954).

[25] The *Henderson* court used language more akin to the "wholly unrelated" test: "We do not believe that section 702c bars Henderson's cause of action in this case because the dam activity here was related to generating electricity and not to flood control." 965 F.2d at 1492. The Corps of Engineers released the water that caused Henderson's death on the order of an electric utility, which under a contract with the United States had the prerogative to make such a request of the Corps. *Ibid.* The

Unlike the "primary purpose" test advanced by petitioners, the courts of appeals have not inquired into whether the government's flood control activities were the proximate cause of the damages. Rather, courts have examined the factual allegations of the complaint to determine whether they describe a connection between the damages and flood control. Most often, as here, that determination can be made on the pleadings alone. Where the relation between the injury and flood control has been absent, courts have denied immunity.[26] Virtually every circuit, however, also has issued a reported decision in which a district court judgment dismissing the complaint has been affirmed because the factual relation to flood control is sufficiently evident from the pleadings to justify the government's immunity under

precise claim involved a failure by the Corps to warn recreational users of rapidly rising water levels when water was released from the dam. *Id.* at 1491. As the court made clear, its rationale rested not on the "primary purpose" of the project or the discharge, but rather on the ground that the court could not "conclude that 'governmental control of flood waters was a substantial factor in causing [Robert Henderson's] injuries.'" *Id.* at 1492 (citation omitted).

[26] See *Kennedy* v. *Texas Utils.*, 179 F.3d 258 (5th Cir. 1999) (no immunity where injury occurred on dry land due to a condition with no association to flood control); *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity from claim by recreational boater injured by allegedly negligent driver of Army Corps of Engineers' boat); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for allegedly negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet come in contact with flood control project); see also *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992) (concluding, on basis of record evidence and language of authorizing statute, that particular project was not a flood control project).

Section 702c.[27] For that reason, and those stated in Parts II and III, the judgment dismissing petitioner's complaint would have been uniformly affirmed by the courts of appeals.

C. The "Primary Purpose" Test Would Deny The Government Flood Immunity In Cases Involving Multiple-Use Projects

Adoption of the "primary purpose" test proposed by petitioner would sharply limit the immunity created by Section 702c. Petitioner's test casts doubt on whether the projects

[27] *Reese* v. *South Fla. Water Management Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995) (per curiam) (government immune from suit in drowning at federal flood control lake caused by opening of water control device, noting that "periodic release of water is fundamental to the operation of a flood control project"); *Boudreau* v. *United States*, 53 F.3d 81, 84 (5th Cir. 1995) (based on facts of case, government immune from suit where there was a "sufficient association" between injury to recreational boater during Coast Guard rescue and activities of flood control), cert. denied, 516 U.S. 1071 (1996); *Holt* v. *United States*, 46 F.3d 1000, 1004 (10th Cir. 1995) (government immune from suit where there was a "sufficient nexus" between car accident and mist, which was created by water released from flood control project's dam and which caused an ice slick on an adjacent road); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683, 685 (8th Cir. 1994) (government immune from suit where shallow level of water as a result of operation of flood control project was a "substantial factor" in a recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (government immune from suit in recreational diving accident occurring at lake which, despite its commercial uses, had flood control uses as well and which was "monitored and maintained daily by the Army for the purpose of controlling floods"); *Fryman* v. *United States*, 901 F.2d 79, 82 (7th Cir.) (government immune from suit for injuries sustained at lake created as part of a flood control project which "increase[d] the probability" of injury), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70, 74 (3d Cir. 1990) (government immune from suit for recreational swimming accident caused by unsafe depth of water due in part to releases of water for flood control purposes); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427, 430 (5th Cir. 1989) (government immune from suit for drowning caused by deep water in a flotation channel that had been excavated for a flood control project).

designated as flood control projects by the Corps of Engineers pursuant to Section 7 of the Flood Control Act of 1944 (see 33 C.F.R. 208.11(e)) would be covered by Section 702c.[28] Indeed, under petitioner's view, no part of the Central Valley Project, which is owned and operated by the Bureau of Reclamation, would qualify for flood immunity, since it was expressly authorized by Congress to be a multiple-use project and Congress did not specify that flood control was the project's "primary purpose." See p. 7, *supra*. Petitioner's rule thus threatens to erase decades of settled law.[29] Only projects owned and operated by the Corps itself would likely have flood control as their primary purpose and, even as to those, a congressional mandate that such projects also serve multiple uses would introduce uncertainty into the scope of immunity.

Petitioner asserts (Br. 21) that its "primary purpose" test promises "ease of administration," but that contention is incorrect. On the contrary, it would require courts to calibrate precisely the respective purposes served by multiple-use projects, a task that Congress itself does not undertake when it authorizes such projects or when it subsequently amends an original authorizing statute.[30] Even if petitioner's

[28] That regulation lists 112 projects operated by entities other than the Corps for a variety of purposes. By law those projects must follow the regulations promulgated by the Corps. See 33 C.F.R. 208.11(e) (Table).

[29] Not only has the Ninth Circuit consistently held that multiple-use projects operated by agencies other than the Corps of Engineers are entitled to flood immunity, see, *e.g.*, *Aetna Ins. Co.*, *supra*; *Morici*, *supra*; but other courts have likewise upheld flood immunity for multiple-purpose projects operated by the Corps, the Bureau, and the Soil Conservation Service. See, *e.g.*, *Lenoir*, 586 F.2d at 1084; *Taylor* v. *United States*, 590 F.2d 263 (8th Cir. 1979); *Callaway* v. *United States*, 568 F.2d 684 (10th Cir. 1978); *Hedrick* v. *United States*, 184 F. Supp. 927 (D.N.M. 1960).

[30] The following are examples of statutes that specify multiple purposes of projects, including flood control, without indicating any priority among the purposes specified: Act of Sept. 20, 1966, Pub. L. No. 89-596, 80 Stat. 822 (Scoggins Dam); Act of Aug. 24, 1962, Pub. L. No. 87-594, 76 Stat.

proposed test were limited to cases involving *releases* of water from federal flood control reservoirs, it would still in many instances require courts to establish priorities among multiple purposes without any evidence that Congress ranked their relative importance. As the court in *Morici* concluded, "it is very difficult, if not impossible, as a practical matter to segregate particular . . . water releases into precise categories of purpose; a single release may well serve multiple purposes, just as the project itself serves multiple purposes." 681 F.2d at 648 (quotation omitted). Furthermore, petitioner's proposed test would require complex evidentiary showings that Congress could not have intended when it enacted Section 702c to "ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *James*, 478 U.S. at 608.[31] Petitioner's approach also

395 (Arbuckle Dam); Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 (B.F. Sisk Dam); Act of Aug. 1, 1956, ch. 809, 70 Stat. 775 (Prosser Creek Dam, Stampede Dam, and Marble Bluff Dam); Act of Dec. 29, 1950, ch. 1183, 64 Stat. 1124 (Sanford Dam); Act of June 5, 1944, ch. 234, 58 Stat. 270 (Hungry Horse Dam); Act of Aug. 11, 1939, ch. 699, 53 Stat. 1414 (Sumner Dam).

The following are examples of statutes in which Congress has specified that the "principal purposes" of the projects include, *inter alia*, flood control: Act of Aug. 16, 1957, Pub. L. No. 85-152, 71 Stat. 372 (Twin Buttes Dam); Act of Aug. 6, 1956, ch. 981, 70 Stat. 1059 (Little Wood River Dam); Act of Feb. 25, 1956, ch. 71, 70 Stat. 28 (Fort Cobb Dam). Even in those statutes, however, Congress did not prioritize among the various "principal purposes." The Corps of Engineers has included all of the projects referenced above in its flood control regulations pursuant to 33 C.F.R. 208.11.

[31] For that reason as well, there is no basis for thinking that the Court's application of immunity in this case will cause any of the hypothesized harms suggested by petitioner (Br. 22) under 42 U.S.C. 4022(a)(2)(B), 22 U.S.C. 277d-12, or 30 U.S.C. 877(f). The absence of any case citations in petitioner's brief suggests that the likelihood of such harm is remote. In any event, if Section 702c "is to be changed, it should be by Congress and not by this Court." *James*, 478 U.S. at 612.

promotes inefficient government, because it denies an immunity for damages when multiple objectives may be obtained and permits immunity only when flood control is the primary purpose of the project.[32] Finally, adoption of petitioner's approach would not resolve the central issue in this case: whether the leakage alleged to have been the result of accreted water damage over time was caused by the flood control purpose or the irrigation purpose of the Madera Canal.

Cases that give rise to assertions of immunity under the Flood Control Act of 1928 involve a diverse array of factual characteristics that make articulating a legal standard more specific than the *James* test a difficult task. Those include: the nature of the claim (property damage versus personal injury); the nature of the government's alleged negligence (*e.g.*, structural or design, human operational error, failure to warn); the relationship of specific governmental actions to the injury (*e.g.*, long-term operations versus discrete actions); and the traceability of the injury to a particular purpose of the project. None of those distinctions alone provides a sound basis for determining that Section 702c does or does not apply. On the other hand, the requirement of a nexus or relation between flood control and the injury that has been applied by the courts of appeals has yielded consistent results that implement Congress's intent to create a broad immunity for federal flood control activities.

As we have shown, the Madera Canal is an integral part of the flood control operations of the CVP's Friant Division, in its routine uses to serve irrigation needs and to convey heavy flows in the San Joaquin River to downstream locations. Because by regulation and historical practice a sub-

[32] For that reason as well, petitioner's suggestion (Br. 31-33) that the applicability of Section 702c immunity should turn in part on whether the government is reimbursed for the construction costs of the project in question should be rejected.

stantial quantity of flood water has been released into the Madera Canal, as a matter of law the United States is entitled to immunity from petitioner's suit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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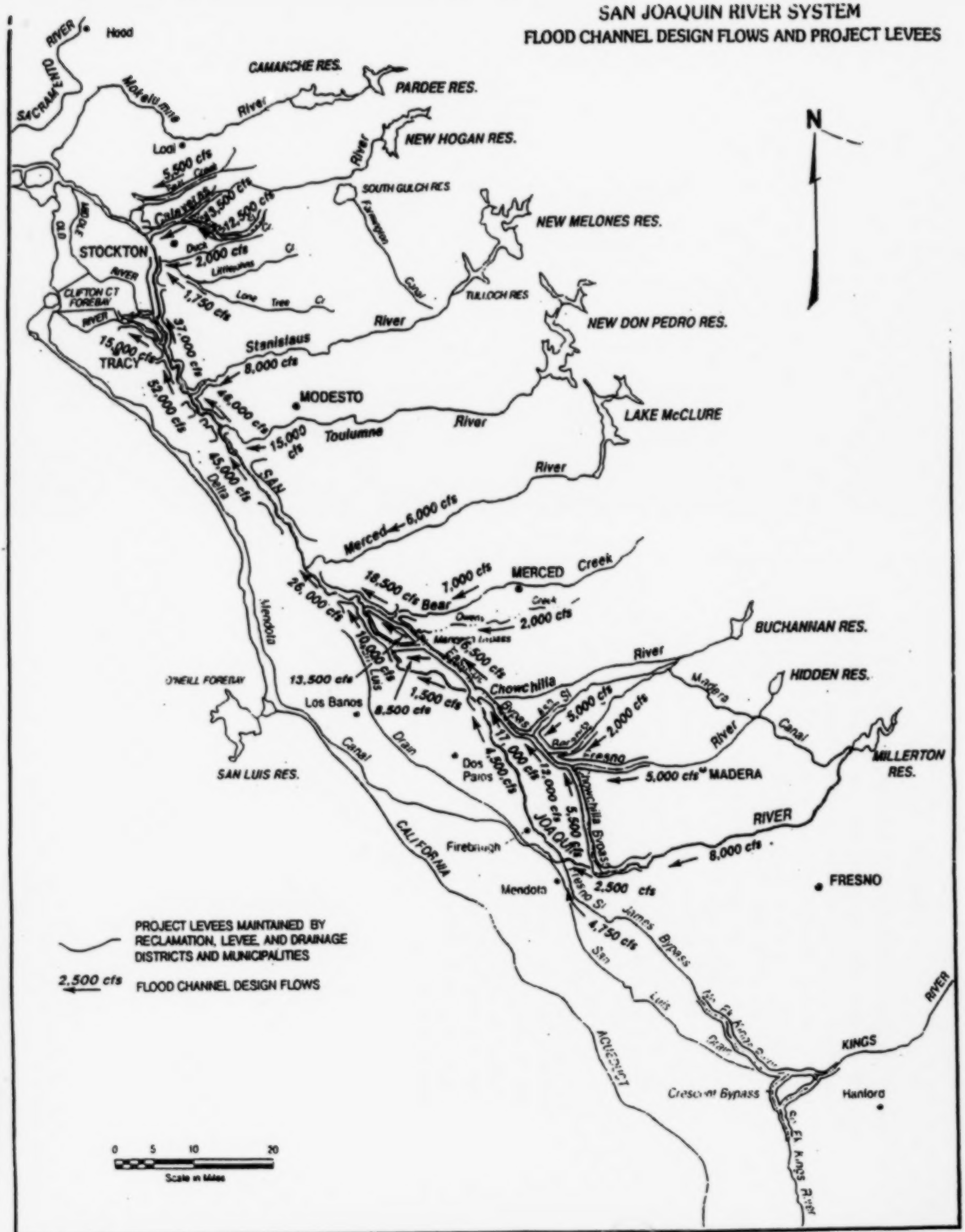
AUGUST 2000

SAN JOAQUIN RIVER SYSTEM
FLOOD CHANNEL DESIGN FLOWS AND PROJECT LEVEES



PROJECT LEVEES MAINTAINED BY RECLAMATION, LEVEE, AND DRAINAGE DISTRICTS AND MUNICIPALITIES

2,500 cfs FLOOD CHANNEL DESIGN FLOWS

PLATE 1

BEST AVAILABLE COPY

APPENDIX

33 U.S.C. 702c, provides, in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h, 702i, 702j, 702k, 702*l*, 702m, and 704 of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

(10)

No. 99-859

SEP 6 - 2000

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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September 6, 2000

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

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REPLY OF THE PETITIONER

The judgment below should be reversed because it conflicts with *United States* v. *James*, in which this Court held that "flood waters" for purposes of Section 702c are those "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. 597, 605 (1986). This case involves irrigation waters leaking from the Madera Canal, which "is *not* a flood control project and serves *no* flood control purpose." Pet. App. 9a (court of appeals' opinion) (emphases added). Rather than seriously defending the Ninth Circuit's rationale, which the panel below acknowledged conflicts with *James*, Respondent asserts for the first time in this Court that it is entitled to immunity because a "substantial quantity" of the water that the Canal carries serves some flood control purpose. Resp. Br. 49-50. Not only is that factual claim hotly contested and impossible to resolve at this stage of the proceedings, but even assuming it were true Respondent plainly would *not* be entitled to immunity for the damage caused by the remainder of the water, which is approximately fifty percent or more of the Madera Canal's volume according to Respondent's own calculations. *Id.* at 40 & n.23. To the extent that other water releases into the Madera Canal serve multiple purposes, several sources confirm that Section 702c applies only to water carried for the "primary purpose" of flood control. Furthermore, this Court squarely held that the Friant Dam is not a "flood control project" in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), a determination that also applies fully to the Madera Canal, which Congress has in fact expressly deemed an "irrigation facility." For the same reasons, Respondent is not entitled to immunity on the theory that Petitioner was damaged by flood waters that a flood control project "could not control."

I. Petitioner Does Not Assert Damages Arising From "Flood Waters."

a. The Judgment Cannot Be Affirmed Given the Procedural Posture of this Case, Which Was Dismissed on the Pleadings. The procedural posture of this case is vital to this Court's decision, notwithstanding that Respondent relegates it to only two paragraphs of its brief. Resp. Br. 11-12. As Respondent acknowledges, Petitioner's position is that Section 702c does "not apply because the waters carried through the Madera Canal are used for irrigation pur-

poses and not for flood control." Resp. Br. 12. That claim is reflected in the complaint's allegations that Respondent is liable for damage caused by "irrigation water" escaping from the Madera Canal. J.A. 7, ¶ 2; *id.* 8, ¶ 7. Before any factual development, however, the district court dismissed Petitioner's complaint on the pleadings. Respondent now acknowledges, albeit only in footnotes, that "for purposes of the motion for judgment on the pleadings the allegations of the complaint must be accepted as true," that the complaint must be "liberally construed in petitioner's favor," and that "the government is entitled to judgment on the pleadings when 'it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.'" Resp. Br. 12 n.7, 32 n.17 (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (emphases added)). In fact, Respondent specifically admitted in the district court that it must be accepted as true that Petitioner was damaged by "irrigation waters." Resp. Mo. J. on Pleadings 2, *reprinted in* Ct. App. Ex. Rec. 139. See generally Pet. Br. 23-24.

The lower courts nonetheless held that Respondent was entitled to judgment on the pleadings based on Ninth Circuit precedent holding that all water carried for any purpose in any portion of a large multiple purpose water project such as the CVP is "flood water" for purposes of Section 702c. Pet. App. 5a-7a, 20a.[1] In this Court, Respondent does not seriously argue that the Ninth Circuit's reading of Section 702c is correct.[2] Instead, its brief is almost entirely devoted to the factual claim that the waters in this case have some relationship to "flood control" activities, as opposed to the Ninth Circuit's per se rule that Section 702 encompasses any water carried for any purpose in any portion of any project that is nominally authorized to engage in flood control.

[1] Respondent claimed in both its brief in opposition and again in a supplemental brief that the Ninth Circuit's holding rested on a determination that the water in the Madera Canal actually served a flood control function. BIO 6-11; Resp. Supp. Br. 7. But Respondent does not repeat that erroneous characterization of the Ninth Circuit's holding and it no longer disputes that the decision below rested *entirely* on the fact that the waters in question were carried in a component of the CVP. Resp. Br. 12 (court of appeals held § 702c applied "because the Madera Canal is part of a federal flood control project"), 18 (court of appeals held § 702c applies "because the Madera Canal is part of the Central Valley Project * * * and thus all waters in the Project are contained in or carried through it for purposes that are at least related to flood control").

[2] That is not surprising, given that, as Petitioner's opening brief explains, the Ninth Circuit's reading of Section 702c is insupportable. *James* squarely held that Section 702c applies only to waters carried "for purposes of or related to flood control," 478 U.S. at 605, a requirement that, as the panel below expressly acknowledged, the Ninth Circuit's standard "delete[s]," Pet App. 7a. *James* rested on the statute's plain text, which does not extend to "all waters in a flood control project" but instead is limited to "flood waters" – *i.e.*, "'the water of a flood.'" Pet. Br. 12 (quoting Webster's Third Int'l Dictionary 873 (1981)).

Respondent's assertions at this late stage of the litigation regarding the nature and volume of waters released into the Madera Canal do little more than demonstrate that this issue is a question of fact that cannot be decided on the pleadings and furthermore face an insuperable obstacle: none of the materials on which Respondent relies are judicially noticeable, at least to the extent of defeating the contrary allegations of Petitioner's complaint. As noted above, the allegation of the complaint that Petitioner was damaged by "irrigation water" rather than "flood water" – *i.e.*, that the waters were not carried "for purposes of or related to flood control" as *James* requires – must be accepted as true. The determination whether that allegation is correct is inherently factual and ultimately can be made only after discovery and trial. Indeed, *Respondent* emphasizes the factbound nature of the question before the Court, explaining that "the central issue in this case [is] whether the leakage alleged to have been the result of accreted water damage over time was caused by the flood control purpose or the irrigation purpose of the Madera Canal" and that to resolve that question "it is necessary to understand * * * the purposes and operations of the CVP and its Friant Division, and the relationship of the Madera Canal to both irrigation and flood control." Resp. Br. 2, 49. Those are not issues that can be resolved as a matter of law.

In the first place, regarding a number of vital factual assertions, Respondent does not offer any factual support *at all*, much less support that is susceptible to judicial notice. A good example is Respondent's argument that, although it cannot establish the volume of

class 1 waters carried in the Madera Canal in past years, this case should be decided by "[a]ssuming the figure of 138,000 acre-feet of Class 1 water per year." Resp. Br. 40 n.23. "Assuming"? There cannot possibly be a basis for precluding Petitioner from exploring this critical, unsupported factual claim or the many others (including practically the whole of page 21) that fill Respondent's brief. See also, *e.g.*, Resp. Br. 10 (assertion regarding monitoring of Friant Dam for flood control), 11 (same regarding adjustment of water levels), 20 (same regarding coordination of water releases).

In the instances in which Respondent actually cites to documents, the referenced materials are not sufficient to strip Petitioner of the right to develop facts and prove its case. Justice Cardozo explained for a unanimous Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, that the doctrine of judicial notice must not become "a pretext for dispensing with a trial":

> Courts take judicial notice of matters of common knowledge. * * * For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states but not of the extent of the depreciation at a given time and place. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved *but is the very point in issue*. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. "It does *not* mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable."

301 U.S. 292, 301-02 (1937) (emphases added) (citing, *inter alia*, 5 Wigmore, Evidence §§ 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence 277, 302; 1 Greenleaf, Evidence 18 (16th ed.)); see also *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 698 (1899) (judicial notice is appropriate only if the matter can "be said to be a matter of general knowledge, or one that ought to be generally known[.] If not, it should be determined by evidence."). When, as in this case, the government's immunity is properly determined through factual development, it is improper to short-circuit that process by resort to "judicial notice." *Scheuer* v. *Rhodes*, 416 U.S. 232, 249-50 (1974); see also Fed. R. Evid. 201 ("[a] judicially noticed fact must be one not subject to reasonable dispute"); *id.*, adv. comm. note ("A high degree of indisputability is the essential pre-

requisite.").[3]

Respondent's claims simply do not satisfy the requirements for judicial notice. Petitioner alleges, consistent with the allegations of the complaint, that the waters leaking from the Madera Canal are used for irrigation, not flood control. That is the central matter in controversy in this case. Respondent admits that Petitioner is correct as to much of the water leaking from the Madera Canal, see *infra* (discussing "class 1" waters), and the parties hotly dispute the nature of the Canal's remaining volume. The sources relied on by Respondent may be contradicted or clarified in discovery and the contested issues must be resolved by trial.

b. Respondent Essentially Admits That It Is Not Entitled To Immunity For At Least Half The Waters At Issue In This Case: The "Class 1" Waters. Even if the materials cited by Respondent were judicially noticeable, the judgment below would still require reversal. First and foremost, Respondent admits, although again only in the footnotes, that a very large proportion of the waters carried in the Madera Canal – the so-called "class 1" waters – have absolutely *nothing* to do with flood control. Resp. Br. 39 n.20, 40 n.23. Respondent admits that these waters are diverted by the Bureau of Reclamation from the flow of the San Joaquin River into the Madera Canal at a time at which there is *no* risk of floods and under a contract that obligates the government to provide the water and, corre-

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[3] Respondent argues to the contrary based on this Court's statement in *Papasan* v. *Allain* that in reviewing a motion to dismiss "we are not precluded in our review of the complaint from taking notice of items in the public record." 478 U.S. 265, 268 n.1 (1986). But as *Papasan* explains in the very next sentence, which Respondent neglects to quote, relying on public record materials to establish facts is only appropriate when "[t]he historical facts recited here comprise in large part the factual allegations of the complaint *and are not disputed by the parties*." *Id.* (emphasis added). The other cases cited by Respondent are simply inapposite. *Bowen* v. *Johnston*, 306 U.S. 19, 23 (1939) (appropriate to take judicial notice of whether Georgia statutes grant the federal government exclusive jurisdiction over a park); *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885) ("The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.").

spondingly, obligates recipients to utilize the water only for irrigation. *Id.* 36-37, 39 n.20, 40. According to Respondent, class 1 waters have encompassed just under half of the Madera Canal's volume for the past twenty years and *more* than half of its volume over the Canal's history. *Id.*; see also Resp. Supp. Br. in Opp. To Cert. 5 (acknowledging "the fact that the Madera Canal is used principally for irrigation"). Respondent does not even attempt to dispute that at least a proportional amount of these admittedly *non*-flood waters have leaked onto and damaged Petitioner's farm. Thus, at the very least, the judgment must be reversed because Respondent does not attempt to offer any theory on which these waters are "flood waters" as required to qualify for immunity under Section 702c.

c. **Respondent Is Not Entitled To Immunity For The Remaining Waters: The "Class 2" Waters.** Respondent contends that the remaining waters carried in the Canal – principally so-called "class 2" waters – are released for flood control purposes and therefore fall within the immunity provided by Section 702c. In support, Respondent cites a contract between the federal government and the Madera Irrigation District that supposedly deems "class 2 waters" to be those "'necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria.'" Resp. Br. 36 (quoting MID Contract, art. 3(h)(1)). Respondent is triply wrong, and its errors demonstrate the problems inherent in its attempt to put such factual matters in issue for the first time in this Court where they cannot be fully explored.

First, the provision quoted by Respondent is *not* the definition of "class 2" water, which is elsewhere expressly defined (in the "Definitions" section of the contract) as that water which "[b]ecause of its uncertainty as to availability and time of occurrence * * * will be undependable in character and will be furnished only if, as, and when it can be made available." MID Contract, at 7. Class 2 waters are thus defined by their juxtaposition to "class 1" waters, which are defined in the same section as those constituting "a dependable water supply." *Id.* In other words, because of the variable flow of the San Joaquin River, see Resp. Br. 39, the federal government has contracted to supply the volume of water that it knows will be available on a definite schedule (the class 1 waters) and has made contingent arrangements to supply additional water to the extent it becomes available (the class 2 waters). See 2 Central Valley Project Documents 83 (1957) (class 2 water is "that supply which may become

available over and above Class 1 water and which, because of its uncertainty as to time of occurrence, will be undependable in character and will be furnished only if, as, and when available as determined by the United States"). The contingency triggering the availability of class 2 waters accordingly is *not* a flood, but instead merely the existence of any water above the minimum anticipated annual flow that is necessary to fulfill "class 1" water obligations.

The provision of the contract quoted by Respondent specifically describes not "class 2 waters" but instead the conditions under which the government may declare an "Obligation Period" during part of the year; Respondent simply omits *both* the beginning and end of the relevant sentence, which is self explanatory. MID Contract, art. 3(h)(1) ("If, during the months of March through September, the Contracting Officer determines it will be necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria, he may establish one (1) or more Obligation Periods of such length as he shall determine to accomplish such evacuation."). The contract defines "Obligation Period" (again, in the "Definitions" section) not as the entire period in which class 2 waters are available, but instead as that time during which the government's contracting officer declares that a user *must* accept class 2 waters or suffer a penalty. *Id.* at 8 ("'Obligation Period' shall mean a period of time during which the Contractor shall be obligated to pay for up to a specified quantity of Class 2 Water in accordance with subdivision (h) of Article 3."). So far as the contract reveals and so far as Petitioner is aware, water users can and do receive class 2 waters outside of "Obligation Periods"; Respondent provides no support for a contrary conclusion. Thus, Respondent is wrong to assert that all class 2 water is by definition "flood water."

Second, even if "Obligation Periods" encompassed the entire period of delivery for class 2 waters, Respondent's argument would still be wrong because it assumes that such periods are triggered by floods. To the contrary, under the plain terms of the contract, the first triggering event for an Obligation Period is not a flood on the San Joaquin River but instead a desire "to prevent or minimize a spill." MID Contract art. 3(h)(1). "Spill" in this context has a vast meaning that Respondent fails to acknowledge: the release of *any* water from Friant Dam into the San Joaquin river bed for whatever reason. *E.g.*, 18 C.F.R. § 12.31 ("Gross storage capacity means the maximum possible volume of water impounded by a dam with zero

spill, that is, without the discharge of water over the dam or a spillway."). (It makes perfect sense that in the event of a possible "spill" the government initiates an "Obligation Period," which requires users to purchase class 2 waters, because a "spill" (unlike an irrigation release) brings in no revenue.) Of particular relevance here, "spills" are not necessarily related to floods but may be triggered simply by efforts to calibrate the volume of Millerton Lake in order to impound the maximum possible irrigation supply. See Pet. Br. 24-26 (explaining that water releases from Millerton Lake are calibrated in order to ensure that reservoir is full during period of peak irrigation demand).

Third, even if "class 2" waters were "flood waters" when held behind Friant Dam, a point Petitioner disputes, they would lose that character once distributed. The government could release the water into the river, but instead diverts it into the Madera Canal, which is a separate facility. The diversion is for the express and exclusive purpose of irrigation, as recipients pay for the water under a contract that forbids its use for any purpose other than irrigation. It is for this reason that, in every context other than this litigation, the government *uniformly* refers to the contents of the Madera Canal as "irrigation waters" rather than "flood waters," confirming Petitioner's commonsense view that Section 702c does not apply to the Canal's irrigation supply. Pet. Br. 30-31 (collecting numerous examples). Respondent's contrary view that "flood waters" retain that character even once diverted for irrigation is furthermore unworkable because it knows no limits – presumably, the government would remain immune even once the water has entered a municipal water supply or has been recycled in the environment, a result Congress could not have intended. See *id.* at 12-13.

d. Respondent Has Failed To Establish The Volume Of Any "Flood Control" Releases Into the Madera Canal. Respondent also claims that the government releases water into the Madera Canal exclusively for the purpose of avoiding floods on the San Joaquin River when more than 8,000 cubic feet per second must be released from Millerton Lake in order to avoid a flood on the San Joaquin. Resp. Br. 21-22, 37-40. Although the nature of these waters needs to be explored on remand, it is possible that they will fall within Section 702c. But Respondent's claim that such waters are released into the Canal as a matter of "routine practice," Resp. Br. 22, is the very grossest exaggeration and illustrates well Respondent's repeated efforts to have this Court blithely accept important factual assertions that would never survive critical inquiry at trial. Respondent cites only one document for its "routine practice" claim, and that document says nothing of the sort. An Army Corps of Engineers document states that "[d]uring flood management operations, floodwaters *can* be routed to the Fresno River via the Madera Canal" and that in periods of snow melt, "the Madera Canal *can* be used to convey up to 1,200 cfs into the Fresno-Chowchilla River System." U.S. Army Corps of Engineers, *Post-Flood Assessment for 1983, 1986, 1995, 1997, Central Valley, Cal.* 3-32 to 3-35 (1999) (emphasis added). But the document says absolutely nothing about when or how regularly this capability is utilized or indicates that any water actually is transferred in this fashion. The closest it comes to addressing the volumes of water possibly implicated is the statement, which Respondent omits, that only "*a relatively small portion* of the flood management releases from Friant Dam *can* be directed to the Fresno River via the Madera Canal." *Id.* (emphases added). By contrast, the same document confirms Petitioner's view that the vast majority of the water in the Canal is carried for irrigation, explaining (in another excerpt that Respondent omits) that water actually "*is* diverted to the Madera and Friant-Kern canals to provide irrigation and municipal and industrial water supplies to the eastern portion of the San Joaquin Valley." *Id.* (emphasis added). The fact that the Canal *can* carry flood flows does not, as if by alchemy, transmute waters carried *not* for flood control but instead for irrigation into "flood waters" subject to Section 702c.

There are still more reasons to doubt that such "flood control" releases are anything other than rare. Petitioner has not been able to identify a single document recording the volume of any such releases; apparently, neither has Respondent. Furthermore, Petitioner's opening brief collected a variety of sources documenting that the Madera Canal is used only for irrigation and that the water it conveys is charged to irrigation users. Pet. Br. 28, 32. Respondent also acknowledges that it operates the Dam for flood control only to the extent "compatible with its primary use for irrigation." Resp. Br. 27 (quoting Flood Control Doc. No. 2, at 3); see also *infra* at 18 (recounting sworn testimony of federal official in suit involving Friant Dam that Madera Canal is not part of Dam's designated flood control operations).

Perhaps most important is that the only source of hard data iden-

tified by Respondent appears to contradict its account. Federal water stations record the daily flows from Friant Dam into the San Joaquin River (station 11251000) and the Madera Canal (11249500). See <<http://water.wr.usgs.gov/index.html>>. As Petitioner understands Respondent's representations to this Court, the water stations should reflect that flows into the River "routine[ly]" approach or exceed 8,000 cfs and, in those instances, are diverted into the Madera Canal for transmission to the Chowchilla River. See Resp. Br. 22. But the water stations appear to show precisely the contrary. In a majority of the years in the 1979-1999 period selected by Respondent, flows from the Dam into the river bed never approached 8000 cfs (which Petitioner gauged by setting a threshold of 7600 cfs) *on a single day of the entire year*. And, so far as Petitioner could determine, on those days that flows into the river bed did approach 8000 cfs they showed *no correlation* with higher flows in the Madera Canal.

e. Releases Serving Multiple Purposes Should Be Evaluated Under the "Primary Purpose" Test. Even if Respondent were correct that the contents of the Madera Canal bore some relationship to flood control efforts, the government would be entitled to immunity only with respect to waters that serve the "primary purpose" of flood control.[4] Respondent argues to the contrary that *any* relationship to flood control is sufficient to trigger Section 702c. But Congress limited Section 702 to "floods or flood waters" rather than adopting a provision so expansive in breadth. On Respondent's view, Section 702c encompasses essentially every water release in any multiple purpose federal facility because, as Petitioner's opening

[4] Respondent's statement that Petitioner did not propose this test below, Resp. Br. 40, is correct but misleading: in the proceedings below, the parties were bound by the Ninth Circuit's longstanding precedent, which applied Section 702c immunity to all waters in a flood control project. It was only in this Court that an alternative test became relevant. Respondent's related argument that no court of appeals has looked to the principal purpose served by water releases, *id.* 44, is not correct – see *Henderson* v. *United States*, 965 F.2d 1488 (CA8 1992) (evaluating whether flood control was a substantial factor in water released based on the "primary purpose" of the release) – but to the extent that the circuits have not adopted that standard it is because they have not reached the question of what test to employ in such "mixed-use" circumstances.

brief explained, virtually every water release can be said to lower water levels and thereby incidentally reduce the risk of floods. Rather than contesting that point, Respondent embraces it, arguing that it is entitled to immunity because "the flood control benefit of a release for irrigation may rest in increasing storage capacity for an anticipated flood." Resp. Br. 35.

Respondent argues that *James* establishes that any relationship to flood control is sufficient to trigger Section 702c, emphasizing that *James* gave the phrases "any damage" of "any kind" in Section 702c their natural, broad reading in the course of rejecting the plaintiffs' claims in that case that the statute did not encompass governmental negligence. Resp. Br. 41. But this case has nothing to do with the word "any" in Section 702c. The relevant portion of the *James* opinion is instead its square holding that the phrase "flood waters" limits the scope of Section 702c to those waters "carried for purposes of or related to flood control." 478 U.S. at 605. Furthermore, the Court twice emphasized that the water releases at issue in *James* were for the purpose of flood control, strongly suggesting that a substantial relationship to flood control efforts is required. See 478 U.S. at 605 (releases were "to prevent flooding"); *id.* at 609-10.

It is also apparent that Congress intended that the immunity provided by Section 702c would be far narrower than Respondent asserts. The facilities constructed under the 1928 Act are projects with the virtually exclusive purpose of controlling floods. As *James* details, Congress enacted Section 702c in order to protect the government from an uncompensated liability – damage caused by flood waters carried in flood control projects – that is entirely absent in the context of revenue-generating activities such as the sale of irrigation water. The legislative history of the 1928 Act (on which *James* relied extensively) also unqualifiedly supports Petitioner's construction of Section 702c – a point detailed at length in Petitioner's opening brief and never addressed by Respondent. *E.g.*, Pet. Br. 13 n.3 (Congressional Record statements consistently treating "flood waters" as those retained, not released for irrigation); *id.* at 13-14 & n.4 (same for Corps of Engineers Report); *id.* at 15 (Congressional Record statements repeatedly distinguishing "flood control" from other beneficial uses of water). Among other things, the legislative history consistently draws a clear line between "flood control" activities and "irrigation" or "reclamation" efforts. *Id.* at 13-15. Particularly relevant here, an Army Corps of Engineers report expressly incorporated

by the 1928 Act is addressed specifically to waters used "primarily" for flood control as opposed to irrigation. *Id.* at 13. Finally, Section 702j of the Act distinguishes waters retained and then diverted for some other purpose (which it deems "reservoired waters") from "flood waters." 33 U.S.C. § 702j.

The primary purpose test also is supported by this Court's decisions interpreting the FTCA. As this Court has squarely held, Congress consciously considered and rejected provisions that would have immunized the government for all damaged caused by flood control projects, concluding that claims for non-flood damages should instead be resolved under the FTCA's discretionary function exemption. *United States* v. *Muniz*, 374 U.S. 150, 156 & n.9 (1963); *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953). Congress specifically intended that the government would be liable for the negligent acts of its agents, both so that citizens would be compensated for damages they incurred and also to encourage the exercise of due care. Pet. Br. 16-17. For this reason, as *amicus* Pacific Legal Foundation details, this Court's decisions establish that exceptions to the FTCA, such as Section 702c's provision immunizing the government for damage caused by "flood waters," must be narrowly construed. PLF Br. 4-5.

In this respect, it is worth noting that Respondent never disputes that its position results in nothing more than an unjust wealth transfer between private parties, requiring Petitioner (who does not receive water from the Madera Canal) to subsidize the costs of project water that otherwise would be borne by irrigation users. Pet. Br. 17. If Petitioner prevails in this case, Respondent will simply pass on any resulting costs to the Madera Canal's irrigation users, a scenario wholly divorced from the risks of uncompensated liability that led Congress to enact Section 702c.[5]

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[5] Relatedly, it is worth noting that the MID Contract on which Respondent elsewhere relies requires irrigation users to indemnify the government for damage caused by waters from the Canal. MID Contract, art. 5(e). Respondent thus is clearly capable of securing any protection from liability it requires by contracting with irrigation users (who, unlike Respondent, benefit from the Canal). In addition, the terms of the indemnity provision are inconsistent with Respondent's claim in this Court that Section 702c applies to the Canal's contents. The government is indemnified for "damage of any nature whatsoever for which there is legal responsibility, including property damage, personal injury or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such Project Water beyond [the Canal's delivery] points," all of which would be unnecessary if Section 702c applied, and furthermore indicates that the government is *not* protected from liability for negligent or willful conduct, which would be encompassed by Section 702c if it applied. *Id.*

Petitioner's position is thus not that "negligent operation of federal flood control projects is excluded from the FTCA's waiver of sovereign immunity" only if the statute's "discretionary function exception" applies. Resp. Br. 43. It is common ground that Section 702c excepts from the FTCA's waiver of sovereign immunity damage caused by waters carried in a flood control project for the purpose of flood control, including when the government has been negligent. *James*, 478 U.S. at 607-08. But Section 702c does not immunize the government for *all* damage resulting from flood control (or irrigation) projects, which would be the practical result of Respondent's view that "flood waters" include *all* of the waters in any multiple purpose project, no matter how tangential their relationship to flood control efforts.

Respondent also fails to grapple with the serious implications that its exceedingly expansive definition of "flood waters" would have for other provisions of federal law. Petitioner's opening brief collected several statutes that are triggered by the existence of "flood waters." Pet. Br. 22. Respondent says only that it is the responsibility of Congress, not this Court, to amend Section 702c. Resp. Br. 48 & n.31. But that is no answer at all. The definition of "flood waters" adopted in this case will have general applicability in federal law, and Respondent does not dispute that its anything-but-plain interpretation would produce ridiculous results for other federal programs. At the very least, these other statutes demonstrate Congress' consistent use of the phrase "flood waters" in a far narrower sense than proposed by Respondent here.

Respondent finally argues that waters impounded behind Friant Dam are an undifferentiated pool of water that cannot be segregated into "irrigation" and "flood" waters and that the primary purpose test would strip the federal government of immunity for waters stored in multiple purpose projects. Resp. Br. 47. But neither of those objections answers Respondent's argument that waters *once diverted* principally for a purpose other than flood control lose their character as

"flood waters." Pet. Br. 14-16. Any difficulties in differentiating the purposes served by waters while impounded behind a dam are minimized if not eliminated once the water is diverted into a separate facility such as an irrigation canal. The distinction between waters held behind a dam and those diverted for another purpose also makes perfect sense in the context of Section 702c: waters in some circumstances can be said to be regulated for flood control while held behind dams, but it is only reasonable to conclude that their character changes once diverted into irrigation canals principally for the purpose of irrigation. That is particularly true when, as here, the canals are separate facilities and the government charges irrigation users for the water. Congress simply could not have intended that the government's immunity would extend indefinitely into the future but, critically, Respondent fails to identify any point at which waters lose their character as flood waters under its reading of Section 702c.

In any event, even as to waters held behind a dam (which are not at issue in this case), Respondent fails to explain why it is not possible to determine whether the waters are retained for flood control or instead some other purpose. Of note, Respondent ignores the fact that it strenuously argued that the purpose for retaining water *could* be determined in another case in this Court. See Pet. Br. 26 n.8 (collecting twelve instances from Solicitor General's brief in No. 86-939, *ETSI Pipeline Project* v. *Missouri*). To the extent that the government initially impounds water in order to prevent a flood but continues to retain the water so that it will be available for irrigation (rather than releasing the water into the lower river bed over time), there is no reason that immunity should continue to attach.

II. The Madera Canal And Friant Dam Are Not "Flood Control Projects."

a. "Flood Control Projects" Are Distinct From "Reclamation" And "Irrigation Projects." This Court in *James*, after carefully evaluating Congress' intent in enacting the Flood Control Act of 1928, 478 U.S. at 606-08, concluded that the statute concerns only "flood control projects designed to control flood waters," *id.* at 605. Petitioner's opening brief established that Congress treats "flood control projects" as a distinct class of facilities operated by the Army Corps of Engineers essentially for the exclusive purpose of flood control. Pet. Br. 33-35. They are clearly distinct from "reclamation" and "irrigation" projects, which are operated by the Bureau of Reclamation, and which are financed by the sale of irrigation water to farmers with lands generally of 160 acres or less. *Id.*

Petitioner's opening brief established that Section 702c applies only to waters carried in "flood control projects," as Congress employs that term of art. The 1928 Act funded the construction of special-purpose flood control facilities. The Solicitor General explained in *James* that because "Congress was legislating with respect to flood control projects designed to carry flood waters," the government's immunity extends to "waters contained in or carried through such structures." Br. for United States, No. 85-434, at 17. As detailed in the previous section, Congress in adopting the 1928 Act manifestly did not have in mind irrigation and reclamation projects.

There is no question that the Madera Canal and the Friant Dam are reclamation, not flood control, projects.[6] That was the square holding of *Gerlach*. See Pet. Br. 35-39. After carefully reviewing the history of the Friant Dam specifically and the CVP generally, Justice Jackson's opinion explains that Congress provided that the reclamation laws would govern both Friant Dam and its attendant canals. 339 U.S. at 732-33. The Bureau of Reclamation specifically treated Friant as "a reclamation project," and "[e]ven a casual inspection of its committee hearings and reports leaves no doubt that Congress was familiar with and approved this interpretation." *Id.* at 739-40. Respondent's attempt to construe *Gerlach* as holding only

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[6] Independent of how one characterizes the Friant Dam, the Madera Canal is a separate "project" for purposes of Section 702c by several measures identified in Petitioner's opening brief and not contested by Respondent. Specifically, it is a separate "reclamation" or "irrigation" project. First, Congress recognized the Madera Canal (as well as its sister facility, the Friant-Kern Canal) as distinct facilities that are separate from the Friant Dam and, indeed, designated the canals as "irrigation facilities." See Act of June 22, 1936, ch. 689, 49 Stat. 1622, *quoted in* Resp. Br. 7. Second, the Bureau of Reclamation, which operates the Canal, recognizes and operates it as distinct from other facilities. See Pet. Br. 27-31. Third, Respondent funds the Canal separately, charging the costs of its construction and its operation to those who benefit from it: irrigation users. See *id.* These measures draw a clear, bright line between any immunity that applies to waters held behind Friant Dam and waters that are released into Madera Canal.

that flood control is not the "*sole* purpose" of the Friant Dam, Resp. Br. 31, thus is flatly inconsistent with the Court's opinion, and its arguments here simply mimic those that it made unsuccessfully in *Gerlach*. See Pet. Br. 36.[7]

b. The Madera Canal And Friant Dam Are Not "Flood Control Projects." Respondent argues that Congress *did* in fact designate the Madera Canal and Friant Dam as flood control facilities in two statutes. First, Respondent invokes Section 2 of the Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850, which authorizes "the entire Central Valley Project" for nine different purposes, including "controlling floods." Resp. Br. 19-20. But as Petitioner explained and Respondent inexplicably ignores, this Court rejected this precise argument when it was advanced by the Solicitor General in *Gerlach*. Pet. Br. 38. The proviso in question was enacted at a time in which it was doubted that Congress had power to construct reclamation projects for wholly intrastate waters. Addressing the precise words in the 1937 Act invoked again by Respondent in this case, the Court explained: "Congress' general direction of purpose we think was intended to help meet any objection to its constitutional power to undertake this big bundle of big projects" and thus "was in justification of federal action on the whole, not for effect on private rights at every location along each component project." *Gerlach*, 339 U.S. at 737-38.[8]

Gerlach aside, Respondent's argument makes no sense as a matter of statutory construction. According to Respondent, Section 2 of the 1937 Act deems every component of the CVP (including the

[7] Relatedly, although Respondent focuses the background section of its brief on the limited flood control functions of the Friant Dam, Resp. Br. 7-11, Respondent admits that the Dam's "primary use" has always been providing irrigation water, *id.* 27; see also *id.* at 23 (acknowledging that Petitioner's opening brief "correctly identifies the reclamation purposes of the Friant Division").

[8] *Gerlach* thus illustrates the fallacy of the Ninth Circuit's holding (endorsed by Respondent here) that Section 702c applies to every project that includes "flood control" as one of its stated purposes. Pet. App. 8a. For projects created before at least the 1940s, such a designation was intended at least in some instances only to preclude the project from being invalidated as beyond Congress' power.

Madera Canal) to have the purpose of flood control. But by parity of reasoning, every CVP facility must have each of the purposes listed in Section 2, including reclaiming "Indian reservations" and the "generation and sale of electric energy." That cannot be true. The Canal has never had anything to do with reclaiming Indian lands or generating electricity. Similarly, so far as Petitioner is aware, not even the Friant Dam irrigates Indian lands, and it certainly was not utilized for generating electricity until many decades after 1937. To the extent the 1937 Act is relevant at all, the controlling provision is therefore instead Congress' determination that "the said dam and reservoirs," *not* irrigation canals, "shall be used [for] flood control." 50 Stat. 850.[9]

Second, Respondent invokes Section 7 of the Flood Control Act of 1944, ch. 665, 58 Stat. 887. Resp. Br. 24-25. That statute directed the Army Corps of Engineers to issue "regulations for the use of storage allocated for flood control or navigation" on any kind of project constructed with any funds allocated for either purpose. 58 Stat. 890. The Corps, in turn, applied those regulations to Friant Dam, and Respondent argues that the Corps' determination is entitled to deference. Resp. Br. 27-28. But Section 7 of the Flood Control Act of 1944 directs the Corps to promulgate regulations regarding the flood control features (*i.e.*, flood storage space) of multipurpose projects. It is not addressed to the Corps' "flood control *projects*," to which the regulations do not apply, 33 C.F.R. § 208.11(a), and the Corps has never issued a regulation stating that the Friant Division is a "flood control project." To the contrary, the report that gave rise to the 1944 Act explains that Friant Dam will be used for flood control only to the extent "compatible with its primary use for irrigation." H.R. Comm. of Flood Control Doc. No. 2, 78th Cong., 2d Sess., *San Joaquin River and Tributaries* 3. Furthermore, the regulations expressly distinguish flood control activities from "other requirements" such as irrigation operations, 33 C.F.R. § 208.11(c)(5), and Respondent admits that the guidelines governing Friant Dam do *not* "specify use of the Madera and Friant-Kern Ca-

[9] Respondent's further argument that the CVP is a flood control project because courts in the Ninth Circuit previously so held, Resp. Br. 20, is mere bootstrapping. That line of Ninth Circuit precedent, which the panel below applied in this case, is wrong for the reasons set forth in the text.

nals," Resp. Br. 28; see also U.S. Dep't of Agric., Bureau of Agric. Econs., History of Legislation and Policy Formation of the Central Valley Project 235 (1946) (1944 Act expressly distinguishes between dams and reservoirs that serve flood control purposes and "irrigation works" that are "necessary for irrigation purposes").[10]

Finally, a federal official charged with managing water control facilities on the San Joaquin River for the Army Corps of Engineers has given sworn testimony in another case that squarely contradicts the Solicitor General's assertions in this Court, once again demonstrating the fallacy of Respondent's view that such factual matters can be resolved as an initial matter here. Thomas Patton testified that although the Madera and Friant-Kern Canals "*could* be used for flood flow diversion," "the canals are *not* part of the designated flood operation of Friant Dam [and in calculating flood flows] we did *not* release floodwater into the canals." Deposition of Thomas K. Patton, Oct. 26, 1998, Riverbend Ranch Golf Course v. County of Madera, No. CV-F-97-5550 (E.D. Cal.), at 95 (emphasis added).

Respondent's only remaining argument is that the Madera Canal and Friant Dam are flood control projects because they carry flood waters and because the CVP operates as an "integrated whole." Petitioner disputes both of those factual claims, but in any event *James* squarely held that Section 702c applies only to "flood control projects designed to carry floodwaters." 478 U.S. at 605. Respondent would collapse those two separate requirements. Moreover, Respondent's view would vastly expand the immunity available under Section 702c. As Petitioner explained in its opening brief, virtually every diversion of water from any federal facility (whether or not a "flood control project") reduces water levels and therefore arguably can be said to reduce the risks of floods. That is precisely the import of Respondent's argument that the CVP operates as "an integrated

[10] In fact, Respondent's resort to the deference owed to agencies only undermines its position because the Corps *has* issued a regulation that distinguishes between projects such as Friant Dam and flood control projects. As Petitioner explained and Respondent ignores, Congress authorized funding for the repair "of any flood control work threatened or destroyed by flood," which the Corps has by regulation construed to exclude "[s]tructures built primarily for * * * land reclamation." 33 U.S.C. § 701n(a)(1); 33 C.F.R. § 203.42(a).

whole," such that diversions in one part affect water levels hundreds of miles away, which in its view immunizes the government for any damage caused by any water-related activities in any of the CVP's hundreds of projects. Resp. Br. 21. Thus, Respondent does not dispute that under its position Section 702 would provide immunity for the components of the CVP that have nothing at all to do with "flood control" but instead transmit water for, *inter alia*, "'power development, domestic and industrial consumption, navigation, waste disposal, control of salinity, enhancement of fish and wild life, [and] beautifying the out-of-doors.'" Pet. Br. 20 (quoting Erwin Cooper, Aqueduct Empire: A Guide to Water in California, Its Turbulent History, and Its Management Today 153, 166 (1968)). Even more important, *Gerlach* squarely rejected the Solicitor General's argument that the supposedly "integrated" nature of the CVP rendered the Friant Dam a "flood control project," explaining that the CVP is "an aggregate of many subsidiary projects, each of which is of first magnitude." 339 U.S. at 733.[11]

III. Petitioner Does Not Claim Damages Arising From Flood Waters That A Flood Control Project "Cannot Control."

Respondent finally relies in passing *James* statement that "'flood[s]' and 'flood waters'" are "waters contained in or carried through a federal flood control project for purposes of or related to flood control, *as well as* * * * *waters that such projects cannot control*." 478 U.S. at 605 (emphasis added); Resp. Br. 18. Respondent argues that the emphasized clause confers immunity for all waters that escape a flood control project, including those waters for which it would *not* be immune if they were still contained in the project. It therefore contends that it makes no difference whether Petitioner was damaged by "flood waters," because Section 702c encompasses *all* waters of *any* kind that a flood control project "cannot control."

[11] Respondent claims in a footnote that the Court meant only that "Congress had specifically directed that the reclamation laws apply to the Friant Division." Resp. Br. 31 n.16. But that reading simply ignores the language of the opinion, including its explanation in the same paragraph that "[t]hese projects are not only widely separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years." 339 U.S. at 733.

Respondent's reading of *James* and Section 702c is obviously flawed and it has never been adopted by any court. Contrary to Respondent's assertion, it specifically was not adopted by the Ninth Circuit in *Morici Corp.* v. *United States*, 681 F.2d 645 (CA9 1982). The emphasized clause self-evidently defines "floods" (not "flood waters") to be waters that flood control projects "cannot control," *i.e.*, waters that were so voluminous that they overran the project. In particular, there is no rational reading of the statute under which the federal government would *not* be immune for waters while retained in the flood control facilities that were the subject of the 1928 Act but *would* be immune if the government negligently released the identical waters resulting in deaths or property damage. Thus, Respondent is entitled to immunity only to the extent that the Madera Canal contains "flood waters," which *James* defines as those waters "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. at 605. Furthermore, it is apparent that Respondent "can" control the water that is leaking from the Madera Canal, but simply refuses to do so.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's opening brief, the judgment should be reversed.

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In the
Supreme Court of the United States

CENTRAL GREEN CO.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the United States benefit from flood control immunity for damage caused by waters held and released only for irrigation purposes?

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae.[1] Written permission to file this brief has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PLF seeks to augment the arguments of Petitioner by addressing the interaction between the immunity provision of the Flood Control Act and the broad waiver of immunity embodied in the Federal Tort Claims Act. PLF believes its public policy perspective and litigation experience will provide

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

an additional and necessary viewpoint on the legal issues presented.

STATEMENT OF THE CASE

The Central Green Company owns 1,000 acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Leaks in the canal have damaged Central Green's orchard. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the canal. Central Green sued the United States and the Madera Irrigation District under the Federal Tort Claims Act, alleging that negligent planning, design, construction, or maintenance led to the leaks that caused surface and subsurface damage to Central Green's property.

The United States responded by claiming immunity under section 702c of the Flood Control Act, which prevents suits "for any damage from or by floods or flood waters at any place." Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The district court and the Ninth Circuit ruled that, because the Madera Canal is part of a project that Congress authorized for flood control purposes, section 702c immunizes the United States from suit, even though the Madera Canal itself is not used for flood control, and the leaks at issue here were not caused by flood conditions.

SUMMARY OF ARGUMENT

In the case at bar, the Central Green Company seeks compensation from the United States for damage caused by the government's negligent acts. Thus, this claim would fall within the scope of the Federal Tort Claims Act, which contains a

broad waiver of sovereign immunity for tort claims against the United States. However, it is established law that when Congress enacted the Federal Tort Claims Act, it did not intend to repeal the immunity provision of the Flood Control Act, which prohibits government liability for damage caused "from or by floods or flood waters." Consequently, flood control immunity persists as an exception to the waiver of immunity in the Federal Tort Claims Act.

Although flood control immunity has not been repealed, this Court has stated that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *Food and Drug Administration v. Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1306 (2000) (internal citation omitted). Since the Federal Tort Claims Act was enacted after the Flood Control Act, its sweeping statement of policy in favor of United States liability for its own torts should "shape or focus" the meaning of the immunity provision of the Flood Control Act.

In order to avoid conflicting with the Federal Tort Claims Act, the immunity provision of the Flood Control Act should be limited to its own terms. Rather than extending to any act that might be remotely related to a federal flood control project, immunity should cover only those federal actions undertaken for the purpose of controlling flooding. Several circuit courts of appeals have so limited the application of the Flood Control Act in light of the purposes of the Federal Tort Claims Act. Restricting the immunity provision to it's express terms is the only way to effectuate the broad purposes of the Federal Tort Claims Act.

ARGUMENT

FLOOD CONTROL IMMUNITY SHOULD BE INTERPRETED NARROWLY IN ORDER TO AVOID CONFLICTING WITH THE BROAD PURPOSES OF THE FEDERAL TORT CLAIMS ACT

A. Exceptions to the Federal Tort Claims Act Are Interpreted Narrowly

The Federal Tort Claims Act is a broad waiver of sovereign immunity that should be interpreted liberally because Congress used such sweeping language. In keeping with this principle, this Court has emphasized, on several occasions, that exceptions to the Federal Tort Claims Act should be interpreted narrowly.

In clear and precise language, the Act declared that federal courts are authorized to "render judgment *on any claim* against the United States, for money only . . . on account of damage to or loss of property," if a private person would be liable for the same wrong.[2] Federal Tort Claims Act, ch. 753, § 410, 60 Stat. 843, 843-44 (1946). This Court has consistently rejected invitations to diminish government liability under the Federal Tort Claims Act, by refusing to burden the act with exceptions.

For example, in *United States v. Yellow Cab*, 340 U.S. 543 (1951), the government claimed that it had not consented to be impleaded as a third-party defendant in an action for contribution due a joint tort-feasor. Since the Federal Tort Claims Act didn't specifically waive sovereign immunity to being impleaded as a third-party defendant, the government claimed, such a waiver did not exist. This Court disagreed, refusing to nit-pick where immunity had been waived in such broad terms:

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[2] Minor changes to the language of the Federal Tort Claims Act were made when Title 28 of the United States Code was recodified. *See Feres v. United States*, 340 U.S. 135, 140 n.9 (1950). On the importance of these changes, this Court has declared: "We attribute to this change of language no substantive change of law." *Id.*

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

United States v. Yellow Cab, 340 U.S. at 554 (quoting Judge Cardozo in *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926)).

Following this pronouncement, this Court has always given the terms of the Federal Tort Claims Act a broad construction. For example, in *Indian Towing Company v. United States*, the Court explained:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*

Indian Towing Company v. United States, 350 U.S. 61, 68-69 (1955) (emphasis added).

Thus, when a given tort falls under the expansive waiver of immunity in the Federal Tort Claims Act, the court should not stretch exceptions to that waiver in an effort to limit liability. Since the broad language of the Federal Tort Claims Act, standing alone, would cover the suit at bar, and waives sovereign immunity in such sweeping language, the immunity preserved in the Flood Control Act should be read narrowly and should be limited to its express terms.

B. The Immunity Provision of the Flood Control Act Should Be Limited to the Plain Meaning of the Text

To avoid conflicting with the expansive purposes of the Federal Tort Claims Act, the immunity provision of the Flood Control Act should be interpreted narrowly. Since both statutes address the potential for governmental liability, each should be interpreted in light of the other. As this Court recently explained,

> [a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 120 S. Ct. at 1306 (internal citations omitted).

So it is in the present case. The Federal Tort Claims Act was enacted after the Flood Control Act. Therefore, the specific liability policy embodied in the Federal Tort Claims Act should control this Court's construction of the Flood Control Act.

The immunity provision of the Flood Control Act, codified at 33 U.S.C. § 702c, preserves immunity only "for any

damage from or by floods or flood waters." Yet the determination of whether the immunity provision will apply often turns on whether the damage is related to a flood control *project*, rather than whether the damage is caused by "floods or flood waters." *See, e.g., Williams v. United States*, 957 F.2d 742 (10th Cir. 1992) (denying immunity because water was released from a navigation project, rather than a flood control project); *Schell v. National Flood Insurers Association*, 520 F. Supp. 150, 154 (1981) (denying government immunity because the National Flood Insurance Act "should not be considered a flood control project"); *State of Washington v. East Columbia Basin Irrigation District*, 105 F.3d 517 (9th Cir. 1997) (recognizing governmental immunity because flood control was one of the purposes of the project, even though collapsed retaining wall was for an irrigation channel); *Portis v. Folk Construction Co.*, 694 F.2d 520 (8th Cir. 1982) (recognizing immunity because lake control structure was part of a flood control project, even though the actual purpose of the structure was to benefit hunters and fishermen by furnishing a natural environment for fish and game).

This focus on flood control projects, rather than on flood waters, has led courts to create tests that have tenuous connections to the text of section 702c. For example, as the Seventh Circuit has explained, the "not wholly unrelated" test used in the Ninth Circuit can lead to ridiculous results:

> If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard

> to conceive that they are "damage from or by floods or flood waters" within the scope of § 702c.

Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990).

Under the Flood Control Act, flood control immunity was intended to protect the construction and operation of flood control projects *for the purposes of controlling flooding*. When courts recognize immunity for conduct with only a tenuous connection to the management of flood waters, they frustrate Congress' purpose in making the United States liable for its own torts. The threat of results like those hypothesized in *Fryman* should impel courts to limit the scope of flood control immunity to activities related to controlling floods. Where immunity is extended beyond these purposes, it conflicts with the broad objectives of the Federal Tort Claims Act.

Several courts of appeals have recognized the importance of interpreting the Flood Control Act in light of the Federal Tort Claims Act. For example, in *Graci v. United States*, the Fifth Circuit explained that earlier cases which may have contained "hints of absolute non-liability" by the Government for flood damage, "have now been superseded by the more liberal policy of the Federal Tort Claims Act." 456 F.2d 20, 28 (5th Cir. 1971). In that case, the Fifth Circuit endorsed Judge Heebe's district court analysis of section 702c. *See id.* 456 F.2d at 27. Judge Heebe discussed the history of the immunity provision of the Flood Control Act, quoting from the *National Manufacturing Company* case:

> The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. [. . .] So that uniformly and throughout the country at any place where there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.

Graci v. United States, 301 F. Supp. 947, 952 (E.D. La. 1969) (quoting *National Manufacturing Company v. United States*, 210 F.2d 263, 270-71 (8th Cir. 1954)).

> One could not wish for a more lucid statement of the rationale of the [section 702c] immunity: that an immunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs. *But there is no reasonable basis to suppose that the government entered into flood control works in exchange for a complete immunity from liability for the negligent and wrongful acts of its employees unconnected with flood control projects.*

Graci v. United States, 301 F. Supp. at 952 (emphasis added). Instead, "[i]nsofar as provisions for federal nonliability for floodwater damage under [section 702c] is totally dissociated from federal involvement in flood control programs, it should be held superseded by the general liberal waiver of immunity of the Federal Tort Claims Act." *Id.* at 954.

To the extent the negligent acts of government employees were not undertaken for the purpose of controlling flood waters, such as in the present case, Judge Heebe, and the Fifth Circuit, would deny immunity because of the broad purposes of the Federal Tort Claims Act.

In the present case, the damage to Petitioner derived from the government's failure to maintain a canal used exclusively for agricultural irrigation, not for controlling flood waters. In fact, as in *Graci*, the Government's negligent acts were totally dissociated from federal involvement in flood control programs. The damage in this case was not caused by flood waters or flood protection activities. Thus, the immunity clause of the Flood Control Act should be held superseded by the general liberal waiver of immunity of the Federal Tort Claims Act as decided by the Fifth Circuit.

The Fifth Circuit is not alone in adopting a narrow interpretation of the Flood Control Act. Both the Fourth and Sixth Circuits also narrow the scope of section 702c immunity in light of the purposes of the Federal Tort Claims Act. In *Hayes v. United States*, the Fourth Circuit explained:

> Since the purpose of [section] 702c was to insulate the federal government's activities in aid of flood control, after enactment of the Federal Tort Claims Act the reach of the [section] 702c immunity has been confined to damage from flooding which allegedly occurred because of the government's antiflooding activity.

585 F.2d 701 (4th Cir. 1978). As the Sixth Circuit more recently explained "focus on the allegedly tortious act is the only way to reconcile the Flood Control Act with the general principles of governmental responsibility embodied in the Federal Tort Claims Act." *Cantrell v. United States*, 89 F.3d 268, 273 (6th Cir. 1996).

CONCLUSION

The Federal Tort Claims Act is an enactment more recent than the Flood Control Act, expressing an expansive intention that the United States should be subject to liability for its own torts. In light of the sweeping language of the Federal Tort Claims Act, which this Court has consistently refused to narrow, the immunity provision of the Flood Control Act should be seen as a minor exception, which is limited to its own terms. Flood control immunity under section 702c should extend only to those acts undertaken for the purposes of controlling flooding. Where, as here, the United States has neglected to maintain irrigation canals, conduct unrelated to any efforts to control flooding, immunity should be denied.

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